CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, Notices, and Abstracts

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 35 SEPTEMBER 19, 2001 NO. 38

This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 01–62)

CANCELLATION OF CUSTOMS BROKER LICENSE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Customs broker license cancellation.

SUMMARY: Pursuant to section 641 of the Tariff Act of 1930, as amended, (19 USC 1641) and the Customs Regulations (19 CFR 111.51), the following Customs broker license is canceled without prejudice.

Name	*License #*	*Port Name*
Danzas Corporation	2005	New York

Dated: August 22, 2001.

BONNI G. TISCHLER,
Assistant Commissioner,
Office of Field Operations.

[Published in the Federal Register, September 10, 2001 (66 FR 47058)]

(T.D. 01–63)

FOREIGN CURRENCIES

DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST FOR AUGUST 2001

The Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Holiday(s): None.

Austria schilling:

August 1, 2001	$0.063901
August 2, 2001	.064047
August 3, 2001	.064265
August 4, 2001	.064265
August 5, 2001	.064265
August 6, 2001	.063967
August 7, 2001	.063770
August 8, 2001	.063792
August 9, 2001	.064577
August 10, 2001	.064970
August 11, 2001	.064970
August 12, 2001	.064970
August 13, 2001	.065282
August 14, 2001	.065587
August 15, 2001	.066234
August 16, 2001	.066408
August 17, 2001	.066605
August 18, 2001	.066605
August 19, 2001	.066605
August 20, 2001	.066328
August 21, 2001	.066241
August 22, 2001	.066815
August 23, 2001	.066612
August 24, 2001	.066249
August 25, 2001	.066249
August 26, 2001	.066249
August 27, 2001	.066118
August 28, 2001	.066147
August 29, 2001	.066110
August 30, 2001	.066525
August 31, 2001	.066060

Belgium franc:

August 1, 2001	$0.021797
August 2, 2001	.021847
August 3, 2001	.021921
August 4, 2001	.021921
August 5, 2001	.021921
August 6, 2001	.021820
August 7, 2001	.021753
August 8, 2001	.021760
August 9, 2001	.022028

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for August 2001 (continued):

Belgium franc (continued):

August 10, 2001	$0.022162
August 11, 2001	.022162
August 12, 2001	.022162
August 13, 2001	.022268
August 14, 2001	.022372
August 15, 2001	.022593
August 16, 2001	.022653
August 17, 2001	.022719
August 18, 2001	.022719
August 19, 2001	.022719
August 20, 2001	.022625
August 21, 2001	.022595
August 22, 2001	.022791
August 23, 2001	.022722
August 24, 2001	.022598
August 25, 2001	.022598
August 26, 2001	.022598
August 27, 2001	.022553
August 28, 2001	.022563
August 29, 2001	.022551
August 30, 2001	.022692
August 31, 2001	.022534

Finland markka:

August 1, 2001	$0.147888
August 2, 2001	.148224
August 3, 2001	.148729
August 4, 2001	.148729
August 5, 2001	.148729
August 6, 2001	.148039
August 7, 2001	.147585
August 8, 2001	.147635
August 9, 2001	.149452
August 10, 2001	.150360
August 11, 2001	.150360
August 12, 2001	.150360
August 13, 2001	.151083
August 14, 2001	.151790
August 15, 2001	.153286
August 16, 2001	.153690
August 17, 2001	.154144
August 18, 2001	.154144
August 19, 2001	.154144
August 20, 2001	.153505
August 21, 2001	.153303
August 22, 2001	.154632
August 23, 2001	.154161
August 24, 2001	.153320
August 25, 2001	.153320
August 26, 2001	.153320
August 27, 2001	.153017
August 28, 2001	.153085
August 29, 2001	.153001
August 30, 2001	.153959
August 31, 2001	.152883

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for August 2001 (continued):

France franc:

August 1, 2001	$0.134048
August 2, 2001	.134353
August 3, 2001	.134811
August 4, 2001	.134811
August 5, 2001	.134811
August 6, 2001	.134186
August 7, 2001	.133774
August 8, 2001	.133820
August 9, 2001	.135466
August 10, 2001	.136289
August 11, 2001	.136289
August 12, 2001	.136289
August 13, 2001	.136945
August 14, 2001	.137585
August 15, 2001	.138942
August 16, 2001	.139308
August 17, 2001	.139720
August 18, 2001	.139720
August 19, 2001	.139720
August 20, 2001	.139140
August 21, 2001	.138957
August 22, 2001	.140162
August 23, 2001	.139735
August 24, 2001	.138973
August 25, 2001	.138973
August 26, 2001	.138973
August 27, 2001	.138698
August 28, 2001	.138759
August 29, 2001	.138683
August 30, 2001	.139552
August 31, 2001	.138576

Germany deutsche mark:

August 1, 2001	$0.449579
August 2, 2001	.450602
August 3, 2001	.452135
August 4, 2001	.452135
August 5, 2001	.452135
August 6, 2001	.450039
August 7, 2001	.448659
August 8, 2001	.448812
August 9, 2001	.454334
August 10, 2001	.457095
August 11, 2001	.457095
August 12, 2001	.457095
August 13, 2001	.459293
August 14, 2001	.461441
August 15, 2001	.465991
August 16, 2001	.467219
August 17, 2001	.468599
August 18, 2001	.468599
August 19, 2001	.468599
August 20, 2001	.466656
August 21, 2001	.466043
August 22, 2001	.470082
August 23, 2001	.468650

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for August 2001 (continued):

Germany deutsche mark (continued):	
August 24, 2001	$0.466094
August 25, 2001	.466094
August 26, 2001	.466094
August 27, 2001	.465173
August 28, 2001	.465378
August 29, 2001	.465122
August 30, 2001	.468037
August 31, 2001	.464764
Greece drachma:	
August 1, 2001	$0.002580
August 2, 2001	.002586
August 3, 2001	.002595
August 4, 2001	.002595
August 5, 2001	.002595
August 6, 2001	.002583
August 7, 2001	.002575
August 8, 2001	.002576
August 9, 2001	.002608
August 10, 2001	.002624
August 11, 2001	.002624
August 12, 2001	.002624
August 13, 2001	.002636
August 14, 2001	.002649
August 15, 2001	.002675
August 16, 2001	.002682
August 17, 2001	.002690
August 18, 2001	.002690
August 19, 2001	.002690
August 20, 2001	.002679
August 21, 2001	.002675
August 22, 2001	.002698
August 23, 2001	.002690
August 24, 2001	.002675
August 25, 2001	.002675
August 26, 2001	.002675
August 27, 2001	.002670
August 28, 2001	.002671
August 29, 2001	.002670
August 30, 2001	.002686
August 31, 2001	.002668
Ireland pound:	
August 1, 2001	$1.116481
August 2, 2001	1.119020
August 3, 2001	1.122829
August 4, 2001	1.122829
August 5, 2001	1.122829
August 6, 2001	1.117623
August 7, 2001	1.114195
August 8, 2001	1.114576
August 9, 2001	1.128289
August 10, 2001	1.135146
August 11, 2001	1.135146
August 12, 2001	1.135146
August 13, 2001	1.140606

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for August 2001 (continued):

Ireland pound (continued):

August 14, 2001	$1.145939
August 15, 2001	1.157239
August 16, 2001	1.160287
August 17, 2001	1.163715
August 18, 2001	1.163715
August 19, 2001	1.163715
August 20, 2001	1.158890
August 21, 2001	1.157366
August 22, 2001	1.167397
August 23, 2001	1.163842
August 24, 2001	1.157493
August 25, 2001	1.157493
August 26, 2001	1.157493
August 27, 2001	1.155208
August 28, 2001	1.155716
August 29, 2001	1.155081
August 30, 2001	1.162318
August 31, 2001	1.154192

Italy lira:

August 1, 2001	$0.000454
August 2, 2001	.000455
August 3, 2001	.000457
August 4, 2001	.000457
August 5, 2001	.000457
August 6, 2001	.000455
August 7, 2001	.000453
August 8, 2001	.000453
August 9, 2001	.000459
August 10, 2001	.000462
August 11, 2001	.000462
August 12, 2001	.000462
August 13, 2001	.000464
August 14, 2001	.000466
August 15, 2001	.000471
August 16, 2001	.000472
August 17, 2001	.000473
August 18, 2001	.000473
August 19, 2001	.000473
August 20, 2001	.000471
August 21, 2001	.000471
August 22, 2001	.000475
August 23, 2001	.000473
August 24, 2001	.000471
August 25, 2001	.000471
August 26, 2001	.000471
August 27, 2001	.000470
August 28, 2001	.000470
August 29, 2001	.000470
August 30, 2001	.000473
August 31, 2001	.000469

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for August 2001 (continued):

Luxembourg franc:	
August 1, 2001	$0.021797
August 2, 2001	.021847
August 3, 2001	.021921
August 4, 2001	.021921
August 5, 2001	.021921
August 6, 2001	.021820
August 7, 2001	.021753
August 8, 2001	.021760
August 9, 2001	.022028
August 10, 2001	.022162
August 11, 2001	.022162
August 12, 2001	.022162
August 13, 2001	.022268
August 14, 2001	.022372
August 15, 2001	.022593
August 16, 2001	.022653
August 17, 2001	.022719
August 18, 2001	.022719
August 19, 2001	.022719
August 20, 2001	.022625
August 21, 2001	.022595
August 22, 2001	.022791
August 23, 2001	.022722
August 24, 2001	.022598
August 25, 2001	.022598
August 26, 2001	.022598
August 27, 2001	.022553
August 28, 2001	.022563
August 29, 2001	.022551
August 30, 2001	.022692
August 31, 2001	.022534
Netherlands guilder:	
August 1, 2001	$0.399009
August 2, 2001	.399917
August 3, 2001	.401278
August 4, 2001	.401278
August 5, 2001	.401278
August 6, 2001	.399417
August 7, 2001	.398192
August 8, 2001	.398328
August 9, 2001	.403229
August 10, 2001	.405680
August 11, 2001	.405680
August 12, 2001	.405680
August 13, 2001	.407631
August 14, 2001	.409537
August 15, 2001	.413575
August 16, 2001	.414664
August 17, 2001	.415890
August 18, 2001	.415890
August 19, 2001	.415890
August 20, 2001	.414165
August 21, 2001	.413621
August 22, 2001	.417206
August 23, 2001	.415935

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for August 2001 (continued):

Netherlands guilder (continued):

August 24, 2001	$0.413666
August 25, 2001	.413666
August 26, 2001	.413666
August 27, 2001	.412849
August 28, 2001	.413031
August 29, 2001	.412804
August 30, 2001	.415390
August 31, 2001	.412486

Portugal escudo:

August 1, 2001	$0.004386
August 2, 2001	.004396
August 3, 2001	.004411
August 4, 2001	.004411
August 5, 2001	.004411
August 6, 2001	.004390
August 7, 2001	.004377
August 8, 2001	.004378
August 9, 2001	.004432
August 10, 2001	.004459
August 11, 2001	.004459
August 12, 2001	.004459
August 13, 2001	.004481
August 14, 2001	.004502
August 15, 2001	.004546
August 16, 2001	.004558
August 17, 2001	.004571
August 18, 2001	.004571
August 19, 2001	.004571
August 20, 2001	.004553
August 21, 2001	.004547
August 22, 2001	.004586
August 23, 2001	.004572
August 24, 2001	.004547
August 25, 2001	.004547
August 26, 2001	.004547
August 27, 2001	.004538
August 28, 2001	.004540
August 29, 2001	.004538
August 30, 2001	.004566
August 31, 2001	.004534

South Korea won:

August 1, 2001	$0.000771
August 2, 2001	.000776
August 3, 2001	.000777
August 4, 2001	.000777
August 5, 2001	.000777
August 6, 2001	.000773
August 7, 2001	.000775
August 8, 2001	.000778
August 9, 2001	.000776
August 10, 2001	.000779
August 11, 2001	.000779
August 12, 2001	.000779
August 13, 2001	.000779

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for August 2001 (continued):

South Korea won (continued):

August 14, 2001	$0.000776
August 15, 2001	.000779
August 16, 2001	.000779
August 17, 2001	.000779
August 18, 2001	.000779
August 19, 2001	.000779
August 20, 2001	.000778
August 21, 2001	.000779
August 22, 2001	.000779
August 23, 2001	.000779
August 24, 2001	.000781
August 25, 2001	.000781
August 26, 2001	.000781
August 27, 2001	.000781
August 28, 2001	.000781
August 29, 2001	.000780
August 30, 2001	.000779
August 31, 2001	.000779

Spain peseta:

August 1, 2001	$0.005285
August 2, 2001	.005297
August 3, 2001	.005315
August 4, 2001	.005315
August 5, 2001	.005315
August 6, 2001	.005290
August 7, 2001	.005274
August 8, 2001	.005276
August 9, 2001	.005341
August 10, 2001	.005373
August 11, 2001	.005373
August 12, 2001	.005373
August 13, 2001	.005399
August 14, 2001	.005424
August 15, 2001	.005478
August 16, 2001	.005492
August 17, 2001	.005508
August 18, 2001	.005508
August 19, 2001	.005508
August 20, 2001	.005485
August 21, 2001	.005478
August 22, 2001	.005526
August 23, 2001	.005509
August 24, 2001	.005479
August 25, 2001	.005479
August 26, 2001	.005479
August 27, 2001	.005468
August 28, 2001	.005470
August 29, 2001	.005467
August 30, 2001	.005502
August 31, 2001	.005463

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for August 2001 (continued):

Taiwan N.T. dollar:

August 1, 2001	$0.028760
August 2, 2001	.028935
August 3, 2001	.028860
August 4, 2001	.028860
August 5, 2001	.028860
August 6, 2001	.028843
August 7, 2001	.028818
August 8, 2001	.028860
August 9, 2001	.028818
August 10, 2001	.028843
August 11, 2001	.028843
August 12, 2001	.028843
August 13, 2001	.028860
August 14, 2001	.028902
August 15, 2001	.028902
August 16, 2001	.028902
August 17, 2001	.028902
August 18, 2001	.028902
August 19, 2001	.028902
August 20, 2001	.028860
August 21, 2001	.028885
August 22, 2001	.028860
August 23, 2001	.028843
August 24, 2001	.028843
August 25, 2001	.028843
August 26, 2001	.028843
August 27, 2001	.028868
August 28, 2001	.028868
August 29, 2001	.028935
August 30, 2001	.028902
August 31, 2001	.028918

Dated: September 4, 2001.

RICHARD B. LAMAN,
Chief,
Customs Information Exchange.

(T.D. 01–64)

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATES FOR AUGUST 2001

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, and reflect variances of 5 per centum or more from the quarterly rates published in Treasury Decision 01–50 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Holiday(s): None.

Australia dollar:	
August 22, 2001	$0.536200
Brazil real:	
August 1, 2001	$0.399680
August 2, 2001	.402901
August 3, 2001	.400000
August 4, 2001	.400000
August 5, 2001	.400000
August 6, 2001	.405351
August 7, 2001	.408497
August 8, 2001	.405515
August 9, 2001	.405515
August 10, 2001	.401768
August 11, 2001	.401768
August 12, 2001	.401768
August 13, 2001	.400000
August 14, 2001	.397614
August 15, 2001	.401606
August 16, 2001	.400962
August 17, 2001	.396197
August 18, 2001	.396197
August 19, 2001	.396197
August 20, 2001	.394555
August 21, 2001	.394789
August 22, 2001	.396040
August 23, 2001	.394945
August 24, 2001	.392311
August 25, 2001	.392311
August 26, 2001	.392311
August 27, 2001	.390625
August 28, 2001	.390625
August 29, 2001	.392311
August 30, 2001	.393082
August 31, 2001	.391850
Denmark krone:	
August 10, 2001	$0.120127
August 11, 2001	.120127
August 12, 2001	.120127
August 13, 2001	.120598

FOREIGN CURRENCIES—Variances from quarterly rates for August 2001 (continued):

Denmark krone (continued):

August 14, 2001	$0.121293
August 15, 2001	.122459
August 16, 2001	.122699
August 17, 2001	.123077
August 18, 2001	.123077
August 19, 2001	.123077
August 20, 2001	.122594
August 21, 2001	.122362
August 22, 2001	.123419
August 23, 2001	.123039
August 24, 2001	.122459
August 25, 2001	.122459
August 26, 2001	.122459
August 27, 2001	.122205
August 28, 2001	.122234
August 29, 2001	.122205
August 30, 2001	.123001
August 31, 2001	.122070

New Zealand dollar:

August 10, 2001	$0.425200
August 11, 2001	.425200
August 12, 2001	.425200
August 13, 2001	.428200
August 14, 2001	.430000
August 15, 2001	.433800
August 16, 2001	.435300
August 17, 2001	.440500
August 18, 2001	.440500
August 19, 2001	.440500
August 20, 2001	.437000
August 21, 2001	.435000
August 22, 2001	.443800
August 23, 2001	.441200
August 24, 2001	.439300
August 25, 2001	.439300
August 26, 2001	.439300
August 27, 2001	.438000
August 28, 2001	.439300
August 29, 2001	.440500
August 30, 2001	.442000
August 31, 2001	.437500

Norway krone:

August 15, 2001	$0.112118
August 16, 2001	.112969
August 17, 2001	.112931
August 18, 2001	.112931
August 19, 2001	.112931
August 20, 2001	.112391
August 21, 2001	.112518
August 22, 2001	.113314
August 23, 2001	.112822
August 24, 2001	.112549
August 25, 2001	.112549
August 26, 2001	.112549

FOREIGN CURRENCIES—Variances from quarterly rates for August 2001 (continued):

Norway krone (continued):

August 27, 2001	$0.112499
August 28, 2001	.112638
August 29, 2001	.112803
August 30, 2001	.113572
August 31, 2001	.112803

South Africa rand:

August 31, 2001	$0.118624

Sweden krona:

August 3, 2001	$0.096404
August 4, 2001	.096404
August 5, 2001	.096404
August 9, 2001	.097078
August 10, 2001	.097205
August 11, 2001	.097205
August 12, 2001	.097205
August 13, 2001	.097333
August 14, 2001	.097752
August 15, 2001	.098464
August 16, 2001	.098348
August 17, 2001	.098304
August 18, 2001	.098304
August 19, 2001	.098304
August 20, 2001	.096395
August 21, 2001	.096572
August 22, 2001	.097490
August 23, 2001	.097050
August 24, 2001	.097286
August 25, 2001	.097286
August 26, 2001	.097286
August 27, 2001	.097182
August 28, 2001	.096852
August 29, 2001	.096321
August 30, 2001	.096432

Switzerland franc:

August 3, 2001	$0.586373
August 4, 2001	.586373
August 5, 2001	.586373
August 9, 2001	.590040
August 10, 2001	.591086
August 11, 2001	.591086
August 12, 2001	.591086
August 13, 2001	.592242
August 14, 2001	.594955
August 15, 2001	.599952
August 16, 2001	.602119
August 17, 2001	.603027
August 18, 2001	.603027
August 19, 2001	.603027
August 20, 2001	.601142
August 21, 2001	.600673
August 22, 2001	.604157
August 23, 2001	.603136
August 24, 2001	.600240

FOREIGN CURRENCIES—Variances from quarterly rates for August 2001 (continued):

Switzerland franc (continued):

August 25, 2001	$0.600240
August 26, 2001	.600240
August 27, 2001	.598910
August 28, 2001	.600240
August 29, 2001	.599161
August 30, 2001	.603318
August 31, 2001	.598874

Dated: September 4, 2001.

RICHARD B. LAMAN,
Chief,
Customs Information Exchange.

U.S. Customs Service

General Notices

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, September 5, 2001.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

DOUGLAS M. BROWNING,
Acting Assistant Commissioner,
Office of Regulations and Rulings.

PROPOSED REVOCATION AND MODIFICATION OF RULING LETTERS AND REVOCATION OF TREATMENT RELATING TO TARIFF CLASSIFICATION OF KEY CHAINS WITH ATTACHED PLASTIC DOLLS OR TOYS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation and modification of a ruling letters and revocation of treatment relating to tariff classification of key chains with attached plastic dolls or toys.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930, as amended, (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke one ruling letter and to modify another pertaining to the tariff classification of key chains with attached plastic dolls or toys under the Harmonized Tariff Schedule of the United States ("HTSUS"). Customs also intends to revoke any treatment previously accorded by Customs to substantially identical transactions. Comments are invited on the correctness of the proposed action.

DATE: Comments must be received on or before October 19, 2001.

ADDRESS: Written comments are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Regulation Branch, 1300 Pennsylvania Avenue, NW, Washington, D.C. 20229. Comments submitted may be inspected at the same address during regular business hours.

FOR FURTHER INFORMATION CONTACT: Deborah Stern, General Classification Branch (202) 927–1968.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "informed compliance" and "shared responsibility." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(1)), this notice advises interested parties that Customs intends to revoke one ruling letter and modify another pertaining to the tariff classification of key chains with attached plastic dolls and toys. Although in this notice Customs is specifically referring to two rulings (NY 817268 and NY A83438), this notice covers any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No additional rulings have been found. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should advise Customs during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(2)), Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs person-

nel applying a ruling of a third party to importations of the same or similar merchandise, to the importer's or Customs' previous interpretation of the Harmonized Tariff Schedule of the United States. Any person involved in substantially identical transactions should advise Customs during this notice period. An importer's failure to advise Customs of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final notice of the proposed action.

In NY 817268, dated December 29, 1995 (Attachment A), and NY A83438, dated June 5, 1996 (Attachment B), Customs classified certain key chains with attached dolls and toys under subheading 9502, HTSUS, as dolls representing only human beings, and under subheading 9503, HTSUS, as toys, other than stuffed, respectively. In general, the purpose of a key chain, regardless of its adornment, is to hold keys. As such, most Customs rulings have classified key chains with attached dolls and toys under heading 7326, HTSUS, as other articles of iron or steel. Imported merchandise consisting of a split ring key chain and a doll or toy are considered composite goods that generally are classified pursuant to the principles of General Rule of Interpretation (GRI) 3, requiring a determination of the essential character of the complete good in order to classify the good for tariff purposes. It is Customs' position that where there are functional and non-functional components of a composite good, the functional component imparts the essential character of the good. *See* HQ 087831, dated November 27, 1990 (holding that under a GRI 3(b) analysis, the essential character of a split key ring with a non-utilitarian vinyl attachment was the steel element); HQ 950636, dated September 16, 1992 (following HQ 087831 to conclude that the essential character of a key ring with a plastic ornament in which a logo or photo could be placed was the steel element, and revoking numerous rulings that did not follow that analysis); HQ 960118, dated January 28, 1999 (holding that the key ring imparted the essential character because of its function, as opposed to the voice synthesizer that merely played prerecorded sounds); HQ 959473, dated April 8, 1997 (holding that a flashlight on key ring was not subordinate to the key ring because it was a working flashlight). However, where a doll or toy has significant manipulative play value such that the key chain is merely incidental to the doll or toy, that good would be classified under headings 9502 or 9503, HTSUS, respectively. See e.g., NY B85825 of May 30, 1997.

Customs maintains that the three key chains classified in NY 817268 and the "Etch-A-Sketch" key chain classified in NY A83438 are composite goods consisting of more than one material or substance. However, due to the utility of the split ring key chains and the limited manipulative play value of the dolls and toy, the key chain component imparts the goods' essential character. Therefore, the subject key chains should be

classified under subheading 7326.20.0050, HTSUS, as: "Other articles of iron or steel * * *: * * * Articles of iron or steel wire: * * * Other.

Pursuant to 19 U.S.C. 1625(c)(1), Customs intends to revoke NY 817268, and any other ruling not specifically identified, classifying the same or similar merchandise, pursuant to the analysis set forth in HQ 965102 (Attachment C), and modify NY A83438 pursuant to HQ 965101 (Attachment D). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by the Customs Service to substantially identical merchandise. Before taking this action, we will give consideration to any written comments timely received.

Dated: August 30, 2001.

JOHN ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, December 29, 1995.

CLA-2-95:RR:NC:FC: 225 817268
Category: Classification
Tariff No. 9502.10.0020 and 9503.50.0020

MR. STEPHEN B. KEENEY
CAP TOYS INC.
26201 Richmond Road
Bedford Heights, OH 44146-1439

Re: The tariff classification of a doll and a toy musical instrument from China.

DEAR MR. KEENEY:

In your letter dated November 30, 1995, received in this office on December 3, 1995, you requested a tariff classification ruling.

Two samples were submitted with your inquiry. The "Micro Size Stretch Armstrong Key Chain" consists of a human figure measuring about 4 inches in height with a permanently attached key chain. The figure has painted facial features and wears a textile top and shorts. The "Micro Jammers Key Chain" comes in an assortment of three styles which include a miniature acoustic guitar, electric guitar and a boom box. All miniature articles are made of plastic and contain a non-replaceable battery which operates a sound reproducing device. Pressing any one of four buttons located on the toy will activate the prerecorded musical sounds. Both products are imported packaged, individually, on a blister card for retail sale.

Classification is based upon the General Rules of Interpretation. The above described key chains are considered composite goods. GRI 3(b) states in part that "composite goods made up of different components which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character". This office finds the essential character of the subject articles to be imparted by the doll and musical toy, respectively.

The applicable subheading for the "Micro Size Stretch Armstrong Key Chain" will be 9502.10.0020, Harmonized Tariff Schedule of the United States (HTS), which provides for

dolls representing only human beings: whether or not dressed: other: not over 33 cm in height. The rate of duty will be free.

The applicable subheading for the "Micro Jammers Key Chain" will be 9503.50.0020, Harmonized Tariff Schedule of the United States (HTS), which provides for toy musical instruments and apparatus. The rate of duty will be free.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Alice J. Wong at 212–466–5538.

ROGER J. SILVESTRI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
New York, NY, June 5, 1996.

CLA–2–95:RR:NC:FC: 225 A83438
Category: Classification
Tariff No. 9502.10.0020 and 9503.90.0030

MS. ANNETTE MCCORMACK
MEIJER, INC.
2929 Walker Avenue, N.W.
Grand Rapids, MI 49544–9428

Re: The tariff classification of a doll and toy with attached key chains from China.

DEAR MS. MCCORMACK:

In your letter dated May 6, 1996, received in this office on May 8, 1996, you requested a tariff classification ruling.

Two sample key chains were submitted with your inquiry. The "Barbie" key chain is composed of an actual "Barbie" doll figure which stands approximately 10 cm in height. The doll has articulated arms, legs and head. A metal key chain with key ring is permanently attached to her back. The figure is molded of plastic and her clothing, makeup and hair have been painted on. The item comes in an assortment which includes a variety of doll fashions. It will be imported packaged in a window box with a cardboard hanger for display purposes.

The "Etch-A-Sketch" key chain consists of a miniature sized working "Etch-A-Sketch" and attached metal key chain with a metal key ring. The turning of two knobs creates a picture, in outline form, on the screen. In order to erase the picture and begin again one must shake the article to clear the screen. The product will be imported packaged on a blister card for retail sale. In a phone conversation you granted this office permission to retain the samples for training purposes.

The above described key chains are considered composite goods, which are goods that consist of different materials or are made up of different components. Classification is based upon the General Rules of Interpretation. GRI 3(b) states in part that "composite goods made up of different components which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character". This office finds the essential character of the subject articles to be imparted by the "Barbie" doll and "Etch-A-Sketch" toy.

The applicable subheading for the "Barbie Key Chain" will be 9502.10.0020, Harmonized Tariff Schedule of the United States (HTS), which provides for dolls representing only human beings: whether or not dressed: other: not over 33 cm in height. The rate of duty will be free.

The applicable subheading for the "Etch-A-Sketch Key Chain" will be 9503.90.0030, Harmonized Tariff Schedule of the United States (HTS), which provides for other toys (except models), not having a spring mechanism. The rate of duty will be free.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Alice J. Wong at 212–466–5538.

ROGER J. SILVESTRI,
Director,
National Commodity Specialist Division.

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE.
Washington, DC.

CLA–2 :RR:CR:GC DBS
Category: Classification
Tariff No: 7326.20.0050

MR. STEPHEN B. KEENEY
CAP TOYS, INC.
26201 Richmond Road
Bedford Heights, OH 44146–1439

Re: Revocation of New York Ruling 817268 regarding the tariff classification of key chains with a doll and a toy musical instrument attached.

DEAR MR. KEENEY:

This letter is to inform you that Customs has reconsidered New York Ruling Letter (NY) 817268, issued to you on December 29, 1995, concerning the tariff classification of the "Micro Size Stretch Armstrong Key Chain" and the "Micro Jammers Key Chain" under the Harmonized Tariff Schedule of the United States (HTSUS). Customs ruled that the subject key chains were classified under subheadings 9502.10.0020, the provision for "dolls representing only human beings and parts and accessories thereof: whether or not dressed: other: not over 33 cm in height;" and 9503.50.0020, the provision for "toy musical instruments and apparatus," respectively. After a review of that ruling, it has been determined that these classifications were incorrect. For the reasons that follow, this ruling revokes NY 817268.

Facts:

According to NY 817268, a "Micro Size Stretch Armstrong Key Chain" consists of a human figure measuring approximately 4 inches in height with permanently attached key chain. The figure has painted facial features and wears a textile top and shorts. The "Micro Jammers Key Chain" comes in an assortment of three styles which include a miniature acoustic guitar, electric guitar and a boom box. The miniature articles are made of plastic and contain a non-replaceable battery which operates a sound reproducing device. Pressing any one of four buttons located on the toy will activate the prerecorded musical sounds. Both products are imported packaged, individually, on a blister card for retail sale.

We note that subheading 9502.10.0020, HTSUS, is now renumbered as subheading 9502.10.0060, HTSUS, and reworded to provide for "dolls representing only human beings and parts and accessories thereof: dolls, whether or not dressed: other. Subheading 9503.50.0020, HTSUS, is now renumbered as subheading 9503.50.00, HTSUS, and reworded to provide for "toy musical instruments and apparatus and parts and accessories thereof.

Issue:

Whether the key chains should be classified under headings 9502 and 9503, HTSUS, as dolls and toys respectively, or under heading 7326, HTSUS, as other articles of iron or steel.

Law and Analysis:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRIs). The systematic detail of the Harmonized System is such that virtually all

goods are classified by application of GRI 1, that is, according to the terms of the headings and any relative Section or Chapter Notes. In the event that goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes (ENs) may be utilized. The ENs, though not dispositive or legally binding, provide commentary on the scope of each heading of the HTSUS, and are the official interpretation of the Harmonized System at the international level. Customs believes the ENs should always be consulted. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The HTSUS headings under consideration are as follows:

7326	Other articles of iron or steel:
7326.20.00	Articles of iron or steel wire
7326.20.50	Other
*	* * * * * * *
9502	Dolls representing only human beings and parts and accessories thereof:
9502.10	Dolls, whether or not dressed
9502.10.0060	Other
*	* * * * * * *
9503	Other toys; reduced-size ("scale") models and similar recreational models, working or not; puzzles of all kinds; parts and accessories thereof:
9503.50.0000	Toy musical instruments and apparatus and parts and accessories thereof

The term "doll" is not defined in the HTSUS. However, EN 95.02 states, in pertinent part, as follows:

> The heading includes not only dolls designed for the amusement of children, but also dolls **for decorative purposes** (e.g., boudoir dolls, mascot dolls), or for use in Punch and Judy or marionette shows, or those of a caricature type.
>
> Dolls are usually made of rubber, plastics, textile materials, wax, ceramics, wood, paperboard, papier maché or combinations of these materials. They may be jointed and contain mechanisms which permit limb, head or eye movements as well as reproductions of the human voice, etc. They may also be dressed. (Emphasis added).

The term "toy" is also not defined in the HTSUS. However, The General EN for Chapter 95 states, in pertinent part, that the "Chapter covers toys of all kinds whether designed for the amusement of children or adults." Further, EN 95.03(A) provides in pertinent part: "Certain toys (e.g., electric irons, sewing machines, musical instruments, etc.) may be capable of limited "use"; but they are generally distinguishable by their size and limited capacity * * *."

GRI 1 provides that articles are to be classified by the terms of the headings and relative Section and Chapter Notes. For an article to be classified in a particular heading, the heading must describe the article, and not be excluded therefrom by any legal note.

The subject articles are novelty items consisting partly of a plastic doll described under heading 9502, HTSUS, and miniature music instruments under heading 9503, HTSUS, and partly of a steel split ring key chain under heading 7326, HTSUS. As such, the items are not specifically provided for in any one heading. Thus, for tariff purposes, they constitute goods consisting of two or more substances or materials. Accordingly, they may not be classified solely on the basis of GRI 1. Further, GRI 2(a) is inapplicable because it applies to incomplete or unfinished articles, and the key chains are imported in a finished complete condition. GRI 2(b) states that the classification of goods consisting of more than one material or substance shall be according to the principles of GRI 3.

GRI 3(a) states that when, by application of rule 2(b) or for any other reason, goods are, *prima facie*, classifiable under two or more headings, the heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods. As the subject key chains are a composite good, we must apply rule 3(b), which provides that composite goods

are to be classified according to the component that gives the good its essential character. We must determine whether the plastic figurines or the steel key ring imparts the essential character to these articles.

EN VIII to GRI 3(b) explains that "[t]he factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of the constituent material in relation to the use of the goods." Recent court decisions on the essential character for 3(b) purposes have looked primarily to the role of the constituent material in relation to the use of the goods. *See Better Home Plastics Corp. v. U.S.*, 915 F. Supp. 1265 (CIT 1996), *aff'd 119* F. 3d 969 (Fed. Cir. 1997); *Mita Copystar America, Inc. v. U.S.*, 966 F.Supp. 1245 (CIT 1997), *rehear'g denied*, 994 F. Supp. 393 (1998); *Vista Int'l Packing Co. v. U.S.*, 890 F. Supp. 1095 (CIT 1995). *See also Pillowtex Corp. v. U.S.*, 893 F. Supp. 188 (CIT 1997), *aff'd* 171 F. 3d 1370 (CAFC 1999).

Moreover, we have consistently held that where a composite good contains both functional and non-functional components, the functional component gives the item its essential character. *See* HQ 087831, dated November 27, 1990 (holding that under a GRI 3(b) analysis, the essential character of a split key ring with a non-utilitarian vinyl attachment was the steel element); HQ 950636, dated September 16, 1992 (following HQ 087831 to conclude that the essential character of a key ring with a plastic ornament in which a logo or photo could be placed was the steel element, and revoking numerous rulings that did not follow that analysis); HQ 960118, dated January 28, 1999 (holding that the key ring imparted the essential character because of its function, as opposed to the voice synthesizer that merely played prerecorded sounds). *See also* HQ 959473, dated April 8, 1997 (holding that flashlight on key ring is not subordinate to the key ring, as a toy would be, for purposes of determining essential character). In HQ 087831, we stated, in pertinent part, that "the steel component is what makes up the utilitarian portion of the key ring, whereas the plastic component is present primarily for decorative purposes." Hence, as a general rule, the steel component is the essential character, and this type of composite good is classified under heading 7326.

However, Customs recognizes that where the doll or toy component has a significant amount of manipulative play value, the doll or toy imparts the essential character of the subject goods. *See* NY B85825, dated May 30, 1997. For example, in NY B85825, the toy component of a "Mr. Potato Head Key Ring" gave the good its essential character because the toy comes complete with attachable features, e.g. eyes, noses and ears, that are stored in the back of its head and can be repeatedly rearranged. The other key chains classified in that ruling had similar levels of manipulative play, constituting their classification in Chapter 95.

Here, the plastic ornament of the "Micro Size Stretch Armstrong Key Chain" is a human figure with painted facial features. Thus, it is a doll representing only human beings that is classifiable under heading 9502, HTSUS. The steel key chain component is classified as other articles of iron or steel under heading 7326, HTSUS. According to the GRI 3(b) analysis enunciated above, the functional component imparts the essential character. The steel key chain performs the function of holding keys, whereas the doll is present for decorative purposes and to add bulk to the entity. As such, it does not have any manipulative play value. Therefore, the essential character is the steel component.

The "Micro Jammers Key Chains" are comprised of plastic miniature musical instruments (acoustic and electric guitars and a boom box) containing sound devices that play prerecorded tunes. Accordingly, it is a toy musical instrument, provided for specifically in subheading 9503.50 and thus would be classified as such. Here, too, the steel key chain component is classified under heading 7326, HTSUS. As stated above, the ENs for heading 9503, HTSUS, distinguishes toy musical instruments from other toys by their limited capacity. The toys here play prerecorded sounds. They cannot be changed by the user. Therefore, it is not functional and has no manipulative play value. Moreover, we have previously held that a key chain with attached voice synthesizer with prerecorded sounds, which is substantially similar to the subjects at issue, is subordinate to the functional key chain component for purposes of essential character. *See* HQ 960118, *supra* at 4. Thus, the essential character is the steel key chain component.

For the reasons above, we conclude that NY 817268 was in error because the function over form and significant manipulative play analyses were not applied to determine the essential character of the goods. The essential character of a key chain with a plastic doll or

toy musical instrument attached is the key chain. They are accordingly classified in subheading 7326.20.0050, HTSUS.

Holding:

The "Micro Size Stretch Armstrong Key Chain" and the "Micro Jammers Key Chain" are classified in subheading 7326.20.0050, HTSUS, which provides for: "other articles of iron or steel, articles of iron or steel wire, other."

NY 817268, dated December 29, 1995, is revoked.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT D]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA-2 :RR:CR:GC DBS
Category: Classification
Tariff No: 7326.20.0050

MS. ANNETTE MCCORMACK
MEIJER, INC.
2929 Walker Avenue, N.W.
Grand Rapids, MI 49544-9428

Re: Modification of New York Ruling A83438 regarding the tariff classification of key chains with attached "Etch-A-Sketch" miniature toy.

DEAR MS. MCCORMACK:

This letter is to inform you that Customs has reconsidered New York Ruling (NY) A83438, issued to you on June 5, 1996, concerning the tariff classification of the "Barbie" key chain and the "Etch-A-Sketch" key chain under the Harmonized Tariff Schedule of the United States (HTSUS). Customs ruled that the subject key chain was classified under subheading 9503.90.0030, HTSUS, the provision for other toys (except models) not having a spring mechanism. After a review of that ruling, it has been determined that the classification of the "Etch-A-Sketch" key chain was incorrect. For the reasons that follow, this ruling modifies NY A83438. The instant ruling has no effect on the classification of the "Barbie" key chain that was also classified in NY A83438.

Facts:

The sample "Etch-A-Sketch" key chain classified in NY A83438 consists of a miniature-sized working "Etch-A-Sketch" and attached steel key chain with a steel key ring (*hereinafter* "steel key chain"). The turning of two knobs on the "Etch-A-Sketch" creates a picture, in outline form, on the screen. In order to erase the picture and begin again one must shake the article to clear the screen.

We note that subheading 9503.90.0030, HTSUS, is now renumbered as subheading 9503.90.0080, HTSUS, and reworded to provide for "Other toys; reduced-size ('scale') models and similar recreational models, working or not; puzzles of all kinds; parts and accessories thereof: other: other."

Issue:

Whether the key chain should be classified under heading 9503, HTSUS, as a toy, or under heading 7326, HTSUS, as other articles of iron or steel.

Law and Analysis:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRIs). The systematic detail of the Harmonized System is such that virtually all goods are classified by application of GRI 1, that is, according to the terms of the headings

and any relative Section or Chapter Notes. In the event that goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes (ENs) may be utilized. ENs, though not dispositive or legally binding, provide commentary on the scope of each heading of the HTSUS, and are the official interpretation of the Harmonized System at the international level. Customs believes the ENs should always be consulted. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The HTSUS headings under consideration are as follows:

7326	Other articles of iron or steel:
7326.20.00	Articles of iron or steel wire
7326.20.51	Other
* * * * * * *	
9503	Other toys; reduced-size ("scale") models and similar recreational models, working or not; puzzles of all kinds; parts and accessories thereof
9503.90	Other
9503.50.0080	Other

The term "toy" is also not defined in the HTSUS. However, the general EN for Chapter 95 states that the "Chapter covers toys of all kinds whether designed for the amusement of children or adults."

GRI 1 provides that articles are to be classified by the terms of the headings and relative Section and Chapter Notes. For an article to be classified in a particular heading, the heading must describe the article, and not be excluded therefrom by any legal note.

The subject articles are novelty items consisting partly of a toy under heading 9503, HTSUS, and partly of a steel split ring key chain under heading 7326, HTSUS. As such, the items are not specifically provided for in any one heading. Thus, for tariff purposes, they constitute goods consisting of two or more substances or materials. Accordingly, they may not be classified solely on the basis of GRI 1. Further, GRI 2(a) is inapplicable because it applies to incomplete or unfinished articles, and the key chains are imported in a finished complete condition. GRI 2(b) states that the classification of goods consisting of more than one material or substance shall be according to the principles of GRI 3.

GRI 3(a) states that when, by application of rule 2(b) or for any other reason, goods are, *prima facie*, classifiable under two or more headings, the heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods. As the subject key chains are a composite good, we must apply rule 3(b), which provides that composite goods are to be classified according to the component that gives the good its essential character. We must determine whether the toy or the steel key chain imparts the essential character to these articles.

EN VIII to GRI 3(b) explains that "[t]he factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of the constituent material in relation to the use of the goods." Recent court decisions on the essential character for 3(b) purposes have looked primarily to the role of the constituent material in relation to the use of the goods. *See Better Home Plastics Corp. v. U.S.*, 915 F. Supp. 1265 (CIT 1996), *aff'd 119* F. 3d 969 (Fed. Cir. 1997); *Mita Copystar America, Inc. v. U.S.*, 966 F.Supp. 1245 (CIT 1997), *rehear'g denied*, 994 F. Supp. 393 (1998); *Vista Int'l Packing Co. v. U.S.*, 890 F. Supp. 1095 (CIT 1995). *See also Pillowtex Corp. v. U.S.*, 893 F. Supp. 188 (CIT 1997), *aff'd* 171 F. 3d 1370 (CAFC 1999).

Moreover, we have consistently held that where a composite good contains both functional and non-functional components, the functional component gives the item its essential character. *See* HQ 087831, dated November 27, 1990 (holding that under a GRI 3(b) analysis, the essential character of a split key ring with a non-utilitarian vinyl attachment was the steel element); HQ 950636, dated September 16, 1992 (following HQ 087831 to conclude that the essential character of a key ring with a plastic ornament in which a logo or photo could be placed was the steel element, and revoking numerous rulings that did not

follow that analysis); HQ 960118, dated January 28, 1999 (holding that the key ring imparted the essential character because of its function, as opposed to the voice synthesizer that merely played prerecorded sounds). *See also* HQ 959473, dated April 8, 1997 (holding that flashlight on key ring is not subordinate to the key ring, as a toy would be, for purposes of determining essential character). In HQ 087831, we stated, in pertinent part, that "the steel component is what makes up the utilitarian portion of the key ring, whereas the plastic component is present primarily for decorative purposes." Hence, as a general rule, the steel component is the essential character, and this type of composite good is classified under heading 7326.

However, Customs recognizes that where the doll or toy component has a significant amount of manipulative play value, the doll or toy imparts the essential character of the subject goods. *See* NY B85825, dated May 30, 1997. For example, in NY B85825, the toy component of a "Mr. Potato Head Key Ring" gave the good its essential character because the toy comes complete with attachable features, e.g. eyes, noses and ears, that are stored in the back of its head and can be repeatedly rearranged. The other key chains classified in that ruling had similar levels of manipulative play, constituting their classification in Chapter 95.

Here, the "Etch-A-Sketch" component is a miniature version of the "Etch-A-Sketch" drawing toy. As such, it would be classifiable under the residual subheading 9503.90, HTSUS, which provides for all other toys not previously enumerated. The steel chain and key ring component is commonly classified as other articles of iron or steel under heading 7326, HTSUS. According to the GRI 3(b) analysis enunciated above, the functional component imparts the essential character. The steel key chain performs the function of holding keys. However, the toy has function, as well, because it has manipulative play value. One can turn the knobs to create a picture in outline form, then shake to erase the picture.

Although this process may be done repeatedly, it does not possess the level of manipulative play as the key chains classified in NY B85825, *supra* at 4, or of the "Barbie" key chain classified in the ruling at issue, NY A83438. The key chains whose essential character is that of a doll or toy due to significant manipulative play value comes with various pieces that can be repeatedly rearranged. Moreover, the toys possess a level of manipulative play more comparable to their full-size counterparts. Not only is the "Etch-A-Sketch a single unit, but the mobility of the miniature "Etch-A-Sketch" knobs is far more limited than a full-size "Etch-A-Sketch." It has only a limited level of manipulative play, not the significant amount required to define the essential character. Thus, the essential character is that of a key chain and not of an "Etch-A-Sketch" toy.

For the reasons above, we conclude that NY A83438 was in error because the function over form and significant manipulative play analyses were not applied to determine the essential character. The essential character of a key chain with an "Etch-A-Sketch" toy attached is the key chain. It is accordingly classified in subheading 7326.20.0050, HTSUS.

Holding:

The "Etch-A-Sketch" key chain is classified in subheading 7326.20.0050, HTSUS, which provides for: "other articles of iron or steel, articles of iron or steel wire, other."

NY A83438, dated June 5, 1996 is hereby modified with respect to the classification of the "Etch-A-Sketch" key chain as set forth herein.

JOHN DURANT,
Director,
Commercial Rulings Division.

United States Court of International Trade

One Federal Plaza
New York, N.Y. 10278

Chief Judge

Gregory W. Carman

Judges

Jane A. Restani
Thomas J. Aquilino, Jr.
Donald C. Pogue
Evan J. Wallach
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Delissa A. Ridgway
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Leo M. Gordon

Decisions of the United States Court of International Trade

(Slip Op. 01–110)

U.S. STEEL GROUP, A UNIT OF USX CORP., ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 99–08–00523

[Agency determination on remand affirmed.]

(Decided August 29, 2001)

Dewey Ballantine LLP (Michael H. Stein, Bradford L. Ward, Navin Joneja) for Plaintiffs.

Stuart E. Schiffer, Acting Assistant Attorney General, *David M. Cohen*, Director, *Lucius B. Lau*, Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; *Peter G. Kirchgraber*, Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, Of Counsel, for Defendant.

OPINION

POGUE, *Judge:* On November 21, 2000, this Court issued *U.S. Steel Group v. United States*, 24 CIT ___, 123 F. Supp. 2d 1365 (2000) *("U.S. Steel I")*. That opinion ordered the Department of Commerce ("Commerce" or "the Department") to reconsider on remand its determination that a suspension agreement entered into with the Ministry of Trade of the Russian Federation ("the Agreement") was in the public interest and prevented price suppression or undercutting, as required by the statute. *See* 19 U.S.C. § 1673c(l)(1) (1994). Familiarity with that opinion is presumed.

The Court now reviews Commerce's Final Redetermination Pursuant to Court Remand ("Redetermination"). Jurisdiction lies under 28 U.S.C. § 1581(c).

STANDARD OF REVIEW

Commerce's Redetermination must be sustained unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

Substantial evidence is "something less than the weight of the evidence." *Consolo v. Federal Maritime Com.*, 383 U.S. 607, 620 (1966).

Nonetheless, Commerce must present "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938) (quoted in *Gold Star Co. v. United States*, 12 CIT 707, 709, 692 F. Supp. 1382, 1383–84 (1988), *aff'd sub nom. Samsung Electronics Co. v. United States*, 873 F.2d 1427 (Fed. Cir. 1989)). The possibility of drawing two inconsistent conclusions from the same evidence does not mean that the agency's finding is unsupported by substantial evidence. *See Consolo*, 383 U.S. at 620. In other words, Commerce's determination will not be overturned merely because the plaintiff "is able to produce evidence * * * in support of its own contentions and in opposition to the evidence supporting the agency's determination." *Torrington Co. v. United States*, 14 CIT 507, 514, 745 F. Supp. 718, 723 (1990)(internal quotation omitted), *aff'd*, 938 F.2d 1276 (Fed. Cir. 1991).

Commerce's conclusions must in any event be "reached by 'reasoned decisionmaking,' including an examination of the relevant data and a reasoned explanation supported by a stated connection between the facts found and the choice made." *Electricity Consumers Resource Council v. Federal Energy Regulatory Com.*, 747 F.2d 1511, 1513 (D.C. Cir. 1984)(citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

DISCUSSION

I. *Commerce's "Public Interest" Determination*

Under the first prong of the statute, 19 U.S.C. § 1673c(l)(1)(A), Commerce may enter into a suspension agreement only if it is "satisfied that suspension of the investigation is in the public interest." 19 U.S.C. § 1673c(d)(1). In evaluating Commerce's determination that the Agreement is in the public interest, the Court first decides whether Commerce's interpretation of the statute is in accordance with law.

In the Redetermination, Commerce reads the statute to confer to it broad discretion in making a subsection (l) public interest determination. In support of this position, Commerce points to the lack of a definition of the "public interest" in both the statute and the legislative history, as well as the use of the word "satisfied," which it suggests connotes a highly subjective state of mind. *See* Redetermination at 14 & n.23.

U.S. Steel does not deny that Commerce has broad discretion in making a public interest determination, but asserts that,

> in analyzing the effects and benefits on the U.S. industry, the Department must take into account the alternatives available to the domestic industry in the absence of a suspension agreement. That is, the benefits to the U.S. industry should be evaluated relative to the effects of an antidumping duty investigation (and order) rather than by comparing the effects of the Suspension Agreement to no relief at all.

Pl.'s Comments at 16. Further, U.S. Steel argues that Commerce is required by the statute to explain how "other" factors it considered in

making its public interest determination "outweigh the very real, direct and vital interests of the domestic steel industry." *Id.* at 18.

Commerce's broad understanding of "the public interest" accords with the clear intent of Congress. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842–43 (1984). The language of section 1673c(d)(1), "in the public interest," does not include any further limiting language, such as that of section 1673c(a)(2)(B), which requires Commerce to take three specific public interest factors into account.[1] *See* 19 U.S.C. § 1673c(a)(2)(B). Thus, the plain language of the statute indicates that Congress intended Commerce to have broad discretion in making its public interest determination, and this Court will not impose limits on Commerce's discretion that were not imposed by Congress. *See Whitman v. Am. Trucking Ass'ns,* 121 S.Ct. 903, 913 (2001) (finding an "intelligible principle" in various statutes authorizing regulation in the "public interest") (citing *National Broadcasting Co. v. United States*, 319 U.S. 190, 225–226 (1943); *New York Cent. Sec. Corp. v. United States,* 287 U.S. 12, 24–25 (1932)).

Moreover, the Court finds no support in the legislative history for Plaintiff's argument that Commerce's discretion is limited by the interest of the domestic industry. Congress did state its intent that "investigations be suspended only when that action serves the interest of the public and the domestic industry affected," which could suggest that one of the factors Commerce must consider is the interest of the domestic industry.[2] *See* S. Rep. No. 96–249, at 71 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 457. And a different part of the statute directs Commerce to suspend an investigation only if suspension is "more beneficial to the domestic industry" than the continuation of investigation. *See* 19 U.S.C. § 1673c(c)(2)(A)(i); *see also* S. Rep. No. 96–249, at 68 (1979), *reprinted in* 1979 U.S.C.C.A.N. at 454. Congress did not, however, apply this language to agreements with nonmarket economies under subsection (l). Thus, while the legislative history may indicate that a suspension agreement must benefit the domestic industry to be in the public interest, there is nothing to suggest that a suspension agreement must be more beneficial than an order, or that "other" factors must outweigh the interest of the domestic industry, in order for the agreement to be legal under the statute.

The Court next reviews whether Commerce's public interest determination is supported by substantial evidence, and whether Commerce adequately explained its conclusion that the Agreement is in the public interest. In the Redetermination, Commerce considers three public interest factors: U.S. producer and worker interests, consumer benefits of the suspension agreement, and the international economic interest of the United States. *See* Redetermination at 15–19.

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[1] Commerce considered, but was not controlled by, the factors articulated in subsection (a)(2)(B), using them as a "useful conceptual framework that the Department has used to inform its analysis * * *." Redetermination at 14.

[2] It is clear in this case that Commerce did take the interest of the domestic industry into account. *See* Redetermination at 15–17.

U.S. Steel does not contest that the Agreement serves the interests of consumers and the international economic interest of the United States, but objects to Commerce's finding that the Agreement serves U.S. producer interests. U.S. Steel asserts that "where, as here, antidumping duty margins are so high as to be prohibitive, the certainty of no imports at all provided by an order is plainly preferable" to the Agreement, which allows in certain quantities of Russian steel. Pl.'s Comments at 17. U.S. Steel also argues that Commerce cannot claim a "market certainty" benefit, because the adjustment procedures that are part of the Agreement make it just as uncertain as an order subject to administrative review.[3] *See id.*

While the domestic producers may prefer an antidumping order, as discussed above, Commerce is not required under the statute to provide substantial evidence that the Agreement serves the domestic producers' interest *more* than an order would; Commerce is rather required to provide substantial evidence that the Agreement is in the public interest. Similarly, it is not incumbent upon Commerce to provide substantial evidence that the Agreement is *more* stable and certain than an order (though Commerce makes this claim); rather, Commerce is required to provide substantial evidence that the Agreement achieves stability and certainty, and explain how stability and certainty serve the public interest.

Under this standard, Commerce's Redetermination withstands scrutiny. First, Commerce points to the price and quantity limits contained in the Agreement, which inherently introduce stability and certainty into the market. *See* Redetermination at 15–16. Stability and certainty benefit the domestic industry by allowing it "to invest and plan for future growth." *Id.* at 16. While, as U.S. Steel points out, the price limits are subject to adjustment, Commerce explains that the reference price mechanism in the Agreement creates certainty because it adjusts Russian steel prices to account for changes in the market, so that the price floor is maintained in "real" terms. *See id.* at 11–12.

Further, Commerce explains that market certainty and stability created by the Agreement benefit consumers by allowing them to continue to purchase hot-rolled steel—the largest merchant steel product—from Russia, albeit in limited quantities and above a price floor. *See id.* at 18–19. Commerce also explains that the price and volume limits of the Agreement serve the international economic interest of the United States in economic stability and a transition to a market economy in Russia, by allowing Russia to continue to export hot-rolled steel, subject to the limits of the Agreement. *Id.* at 19.

Commerce relies as well on other features of the Agreement that serve the public interest. For example, the Agreement contains anti-circum-

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[3] U.S. Steel raised a similar objection to the draft of the Redetermination. Commerce responds in the Redetermination that the price and volume limits contained in the Agreement make the Agreement "inherently more stable and predictable than conditions under an order," noting that an order does not contain volume limits and that the amount of duties actually imposed could change significantly through the administrative review process. *See* Redetermination at 31 & n.33.

vention provisions that promote the integrity and transparency of the Agreement. *See* Redetermination at 16. Additionally, the Agreement is linked to a comprehensive agreement covering a broad array of steel products exported from Russia to the United States, such that if Russia withdraws from the comprehensive agreement, Commerce will terminate the suspension agreement. *See id.* at 16–17. This provision protects integrated steel producers who produce hot-rolled steel as well as other steel products covered by the comprehensive agreement. *See id.* Lastly, the Agreement benefits domestic producers by limiting Russian market share to a level prevailing before imports of Russian steel were harming the domestic industry. *See id.* at 17.

As Commerce observes, the benefits of the Agreement "are different from those that would accrue to the domestic industry under an antidumping order"; this does not mean, however, that the Agreement is not in the public interest. *Id.* at 31. Commerce points to specific features of the Agreement and then explains how these features serve the public interest, taking into account the interests of the domestic industry and domestic consumers, and the international economic interests of the United States. Accordingly, Commerce's determination that the Agreement is in the public interest is supported by substantial evidence and otherwise in accordance with law.

II. *Commerce's Determination that the Agreement will Prevent Price Suppression or Undercutting*

Under the second prong of the statute, Commerce must determine that a suspension agreement "will prevent the suppression or undercutting of price levels of domestic products by imports of the merchandise under investigation." 19 U.S.C. § 1673c(l)(1)(B). As above, in evaluating Commerce's determination that the Agreement prevents price suppression or undercutting, the Court first decides whether Commerce's interpretation of the statute is in accordance with law.

In *U.S. Steel I*, the Court held that the language of the statute is ambiguous. *See* 24 CIT at ____, 123 F. Supp. 2d at 1371. The next question, then, is whether or not *Chevron* deference should be given to the agency's interpretation of the statute. *See United States v. Mead Corp.*, 121 S. Ct. 2164, 2171–73 (2001). An agency's interpretation of a statute,

> qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.

Mead, 121 S. Ct. at 2171.

In concluding that Commerce's interpretation of the statute governing suspension agreements qualifies for *Chevron* deference, the Court notes first that Congress appears to have delegated primary authority to

Commerce to interpret the antidumping laws generally. *See id.* at 2172 ("[I]t can [] be apparent from the agency's generally conferred authority * * * that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute * * *."). Congress stated that, in enacting title 19 with its limited standard of review, it "by law entrusted the decision-making authority in a specialized, complex economic situation to [Commerce]." *See* S. Rep. No. 96–249, at 251–52, *reprinted in* 1979 U.S.C.C.A.N. at 638; *compare Mead*, 121 S. Ct. at 2174 (pointing to this court's power of *de novo* review of Customs classification rulings as evidence that *Chevron* deference not warranted). Furthermore, our appellate court has repeatedly stressed its view that Congress vested Commerce, and not the court, with primary authority to interpret the antidumping laws. *See, e.g., Koyo Seiko Co. v. United States*, slip op. 00–1500, at 10 (Fed. Cir. July 20, 2001) ("In antidumping cases, this court has repeatedly recognized 'Commerce's special expertise,' and it has 'accord[ed] substantial deference to its construction of pertinent statutes.'") (quoting *Micron Tech v. United States*, 117 F.3d 1386, 1394 (Fed. Cir. 1997); *Daewoo Elecs. Co. v. International Union of Elec., Tech., Salaried & Mech. Workers*, 6 F.3d 1511, 1516 (Fed. Cir. 1993) (referring to Commerce as the "'master' of antidumping law, [and] worthy of considerable deference" in questions of statutory interpretation) (internal citations omitted); *see also, American Silicon Technologies, et al. v. United States*, slip op. 00–1400, at 10 (Fed. Cir. Aug. 16, 2001).

Though it appears that Congress has made a general delegation of authority to Commerce to interpret the statute, *Mead* makes clear that, where notice-and-comment or formal adjudication procedures are not used, a court should also consider whether Congress "provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement [with the effect of law]." *Mead*, 121 S. Ct. at 2172. Because the agencies this court reviews so often interpret the antidumping and countervailing duty statutes in less formal formats than those provided for in the Administrative Procedure Act, we make clear that, our conclusion in this case notwithstanding, less deference may be owed by the Court of International Trade to agency interpretations in other contexts.

The provisions governing subsection (l) suspension agreement determinations do not reach the level of formality of the provisions of the Administrative Procedure Act for formal adjudications and notice-and-comment rulemaking.[4] Nonetheless, this case presents "circumstances reasonably suggesting that Congress * * * thought of [interpretations contained in suspension agreement determinations] as deserving the deference claimed for them here." *Id.* at 2173. In particular, Congress gave Commerce explicit power to suspend an investigation upon acceptance of a suspension agreement with a nonmarket economy in accor-

[4] It should be noted that Commerce did give the domestic producers the opportunity to comment on both the Agreement and the Redetermination. *See* Redetermination at 2, 3.

dance with subsection 1673c(l). Subsection 1673c(l) requires Commerce to publish a determination that satisfies specific statutory criteria in order to enter into a suspension agreement. Subsection (d), to which subsection (l) refers, further requires Commerce, if it decides not to accept a proposed agreement and thus does not issue a determination, to, "[w]here practicable * * * provide to the exporters who would have been subject to the agreement the reasons for not accepting the agreement and, to the extent possible, an opportunity to submit comments thereon." 19 U.S.C. § 1673c(d).

Commerce's suspension agreement determinations are "relatively formal" and "foster [] fairness and deliberation," insofar as the statute requires Commerce to explain in writing and with reference to specific criteria its reasons for entering into an agreement. *Cf. Mead*, 121 S. Ct. at 2174–75 (describing the informalities of administrative procedure related to issuance of Customs classification rulings such that these rulings are "best treated like 'interpretations contained in policy statements, agency manuals, and enforcement guidelines[,]" and thus "beyond the *Chevron* pale") (quoting *Christensen v. Harris County*, 529 U.S. 576, 587 (2000)). It therefore appears to this Court that *Chevron* deference is warranted in this instance, and, accordingly, the Court reviews Commerce's interpretation of the statute for reasonableness. *See Chevron*, 467 U.S. at 844.

In the Redetermination, Commerce interprets the language of 1673c(l)(1)(B) to mean that, "a subsection (l) agreement that prevents *significant* price suppression or undercutting satisfies the statutory requirement that such an agreement prevent price suppression or undercutting, and provides effective relief to the domestic industry." Redetermination at 7 (emphasis added). U.S. Steel argues that this interpretation is not in accordance with law because it gives Commerce unbounded discretion, "as the Department can find practically any amount of price suppression to be insignificant." Pl.'s Comments at 7. According to U.S. Steel, Commerce must explain how much price suppression is "significant" in order to comply with this Court's order on remand. *Id.* at 8.

In *U.S. Steel I*, the Court found that the word "prevent" is subject to two possible interpretations. Under one interpretation, tied to the "preclude" definition of "prevent," an agreement would have to prevent all price suppression. 24 CIT at ____, 123 F. Supp. 2d at 1371. Under the second interpretation, tied to the slightly more flexible "impede" or "avert" definition of "prevent," an agreement would have to effectively counteract—without necessarily eliminating—price suppression. *Id.*

The Court finds that Commerce's interpretation of the statute is reasonable because it is in accord with the interpretation tied to the latter definition of "prevent," and because, contrary to U.S. Steel's suggestions, this interpretation creates a reviewable standard. How much price suppression is "significant" may be determined on a case-by-case basis. *See SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947); *see also Fabri-*

que De Fer De Charleroi S.A. v. United States, slip op. 01–82, at 21 (CIT July 3, 2001) (holding that Commerce may "reach[ ] a determination after examining the particular circumstances of the case without formally promulgating an all-inclusive standard"). And any conclusion that an agreement prevents "significant" price suppression must be supported by substantial evidence and explained in a reasoned way.[5]

The Court now considers whether Commerce's conclusion that the Agreement prevents "significant" price suppression and thus provides effective relief to the domestic industry is supported by substantial evidence and explained in a reasoned way, and finds that it is. On remand, Commerce explains that price suppression in the domestic industry was caused by both the large volume and low price of imports of Russian hot-rolled steel; consequently, in negotiating the Agreement, Commerce took both price and volume factors into account. The Agreement provides for a moratorium, during which no imports are permitted, followed by a period during which the quantity and price of imports are restricted. *See* Redetermination at 8, 11–12. By comparing the amount of price undercutting that occurred during the ITC preliminary report period (i.e., from October 1997 through September 1998), to the amount of undercutting eliminated by the restrictions on price and volume for the first year of the Agreement, Commerce demonstrates that the amount of undercutting allowed by the Agreement following the moratorium is less then fourteen percent of the undercutting which occurred during the comparison period; in other words, eighty-six percent of price undercutting is prevented.[6] *Id.* at 9–10. This "summary statistic," explains Commerce, is evidence that the price suppression prevented is substantial. *See id.* at 29.

In subsequent, "out" years, Commerce asserts that the volume increases are "moderate," such that the largest annual volume allowed is less than thirty percent of the import volume for the comparison period.[7] *See id.* at 11. Price limits in the "out" years will be tied to a reference price established in the first year of the Agreement, and adjusted based on prices of steel from countries not subject to an order. *See id.* at 11–12. This "reference price" mechanism will have the effect of maintaining price restrictions in "real terms," in relation to fairly priced imports. *See* Redetermination at 12.

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[5] Because Commerce's interpretation of the statute is reasonable for the reasons given above, the Court declines to address the merits of the parties' arguments addressed to whether it is acceptable to "import" the "significant degree" language from the statute governing the ITC's injury determinations. *See* Redetermination at 6–7; Pl.'s Comments at 7, 8–9.

[6] According to Commerce, the "eighty-six percent" figure is conservative, because it attributes all of the price difference between domestic and Russian hot-rolled steel to undercutting, rather than other differences such as quality. *See* Redetermination at 10–11 & n.21. Also, Commerce used the highest per-ton price for domestic steel reported by the ITC; if Commerce had used one of the lower prices reported in other sources for the same period, the amount of undercutting for the comparison period would be less, and thus the amount prevented by the Agreement would be more. *See id.* at 10 n.19.

[7] Commerce also notes that import volumes surged in the fourth quarter of 1998. *See* Redetermination at 11. The largest annual volume of imports allowed under the Agreement would be less than twenty percent of imports recorded for calendar year 1998. *See id.* Furthermore, though there is no ITC undercutting data for the fourth quarter of 1998, if the margin of underselling remained the same as in the ITC data for the preliminary report period, then for the calendar year 1998, ninety percent of price suppression was prevented. *See id.*

U.S. Steel does not appear to challenge Commerce's conclusion on substantial evidence grounds, but rather challenges the analysis Commerce uses to arrive at its conclusion on several grounds. *See* Pl.'s Comments at 9–16. First, U.S. Steel argues that price undercutting is not a measure of price suppression, because if domestic producers refrain from lowering their prices in response to low-priced imports, domestic prices won't be suppressed, but domestic producers will cede market share. *See id.* at 10–12. In order to effectively prevent price suppression, suggests U.S. Steel, Commerce must analyze how domestic producers will respond in the future to unfairly priced imports. *See id.* at 12–13. Second, according to U.S. Steel, Commere's approach is, contrary to the statute, "backward-looking." *See id.* at 13 (emphasizing the "will prevent" language of section 1673c(l)(1)(B)). Third, because Commerce can't predict the future, U.S. Steel claims that there is no reasoned basis for the volume limits for the "out" years of the Agreement.[8] *See id.* at 14. Finally, U.S. Steel faults Commerce for "concoct[ing] a *post hoc* rationalization for a particular decision with no intention of making it generally applicable to future cases." Pl.'s Comments at 15.

While the Court appreciates U.S. Steel's observation that price undercutting and price suppression are not always directly related, it does little to undercut the validity of Commerce's analysis in the case at hand. The statute requires Commerce to prevent price suppression *or* price undercutting, so an agreement that prevents significant price undercutting is acceptable, especially where, as here, price undercutting caused price suppression. *See* 19 U.S.C. § 1673c(l)(1)(B). Indeed, U.S. Steel does not dispute that what caused price suppression in this case was a high volume of extremely low-priced imports. *See* Pl.'s Comments at 11. The Court agrees with Commerce that, here, price undercutting is a suitable proxy for price suppression "because price underselling is, in this case, the root cause of price suppression. By materially eliminating the cause of price suppression, the Department is preventing price suppression itself." Redetermination at 29.

U.S. Steel succeeds in demonstrating that Commerce's analysis may not always be appropriate, if applied generally across different factual scenarios, but fails to demonstrate that Commerce's analysis is inappropriate in this specific instance. Commerce explains in the Redetermination the connection between the facts it found regarding the causes and amounts of price suppression and the choices it made in the Agreement, namely, a moratorium followed by significant restrictions on the price and volume of Russian imports. In addition, "[t]he methodologies relied upon by Commerce in making its determinations are presumptively correct." *Thai Pineapple Pub. Co. v. United States*, 187 F.3d 1362, 1365 (Fed. Cir. 1999) (citing *Fujitsu Gen. v. United States*, 88 F.3d 1034, 1044 (Fed. Cir. 1996)), *cert. denied*, 529 U.S. 1097 (2000). While the use

[8] U.S. Steel also asserts that Commerce has not explained how it arrived at its allocation of price to volume limits, *see* Pl.'s Comments at 13–14, but U.S. Steel failed to raise this argument at the agency level. Because none of the recognized exceptions to the doctrine of exhaustion is applicable here, *see FAG Kugelfischer Georg Schafer AG v. United States*, 25 CIT ___, ___, 131 F. Supp. 2d 104, 113–114 (2001), U.S. Steel's argument is not appropriately before the court.

of econometric modeling or other methods to determine how domestic producers will respond to a certain amount of imports at a certain price may also be appropriate, this Court cannot find that the method Commerce uses, which analyzes historical data to determine how to effectively control the impact of future imports on domestic producers, is inappropriate in this case.

The remainder of U.S. Steel's arguments are also unpersuasive. Commerce's analysis is "backward-looking" only to the extent that it relies on historical data to provide a basis for setting price and volume limits at a level that will prevent significant price suppression in the future. And, to the extent that Commerce fails to predict the future accurately, there are adjustment mechanisms built into the Agreement, as well as statutory provisions for administrative review, *see* 19 U.S.C. § 1675(a)(1)(c), and for termination of subsection (l) suspension agreements that fail to prevent suppression or undercutting of domestic producer prices, *see* 19 U.S.C. § 1673c(l)(2).

Lastly, in *U.S. Steel I*, the Court did not require Commerce on remand to issue generally applicable regulations or guidelines in support of the analysis used in the Agreement; rather, the Court asked Commerce to demonstrate that it "exercised reasoned discretion in arriving at the conclusion that the Agreement prevents price suppression or undercutting." 24 CIT at ____, 123 F. Supp. 2d at 1371. There is no *post hoc* rationalization problem where the agency re-examines its conclusion on remand, and, though arriving at the same conclusion, explains the conclusion in a reasoned way as guided by the facts of the case and its reasonable interpretation of the statute. *See Mitsubishi Heavy Industries, Ltd. v. United States*, 24 CIT ____, ____, 97 F. Supp. 2d 1203, 1209 n.9 (2000).

CONCLUSION

Commerce's Redetermination is supported by substantial evidence and is otherwise in accordance with the law, and is therefore affirmed in all respects.

(Slip Op. 01–111)

VWP OF AMERICA, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 93–12–00803

[Matter remanded to the U.S. Customs Service for consideration of transaction, deductive, and computed values, as appropriate, of certain fabrics imported from Canada.]

(Dated August 29, 2001)

Barnes, Richardson & Colburn (James S. O'Kelly and *Alan Goggins)*, New York City, for the plaintiff.

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OPINION

MUSGRAVE, *Judge:* Familiarity with prior decisions is presumed. Briefly, the matter concerns the proper valuation of 34 shipments of woolen "melton,"[1] stripes, plaids, and tweeds entered for consumption between November 17, 1992 and February 1, 1993 by plaintiff Victor Woollen Products of America, Inc. ("VWPA") from its parent and the manufacturer of the fabrics, Les Lainages Victor Ltée (a/k/a Victor Woollen Products, Ltd.), of St. Victor de Beauce, Quebec, Canada ("VWPC").[2] The fabrics were classified by the United States Customs Service ("Customs") under Item 5111.30.9000 of the Harmonized Tariff Schedules of the United States, and dutied at 38 percent *ad valorem* plus 22 cents per pound. *VWP of America, Inc. v. United States*, 21 CIT 1109, 980 F. Supp. 1280 (1997) found VWPC and VWPA, as a matter of fact, to be one and the same for customs duty purposes and ruled in favor of the defendant. The Court of Appeals for the Federal Circuit ("CAFC") disagreed, finding that the VWPC-VWPA transactions were sales "for exportation" to the United States which "may serve as the basis for transaction value" if such sales "satisfy the requirements of 19 U.S.C. § 1401a(b)(1)" and provided that "the acceptability of the transaction value arising from such sales is established under 19 U.S.C. § 1401a(b)(2)(B)." *VWP of America, Inc. v. United States*, 175 F.3d 1327, 1338 (Fed. Cir. 1999). Toward that end, the matter has been remanded for: (i) consideration of whether certain costs and expenses must be included in the declared transaction values pursuant to § (b)(1) or § (b)(4)(A) of 19 U.S.C. § 1401a, (ii) comparing the VWPC-VWPA transactions against the Cookshiretex sales in accordance with 19 U.S.C. § 1401a(b)(2)(B)(i) (the transaction values established by the Customs with regard to the Cookshiretex sales being presumed correct by virtue of 28 U.S.C. § 2639(a)(1)), and (iii) as necessary, *de novo* review of the

[1] "Melton" is "fabric with all] [wool or cotton warp and woolen weft; the face is napped carefully to raise the nap straight up, showing the weave clearly. Also known as beaver cloth; kersey." *McGraw-Hill Dictionary of Scientific and Technical Terms* 1171 (4th ed. 1989). The melton at issue is primarily of wool and nylon with a smooth finish and was intended for use mainly as wool bodies in high school varsity jackets.

[2] VWPA and VWPC herein collectively "Victor Woollen Products."

plaintiff's deductive and computed values under 19 U.S.C. § 1401a (d) and (e), respectively. *Id.* at 1343. The matter will be remanded to Customs for further proceedings in accordance with this opinion.

DISCUSSION

Under the Trade Agreements Act of 1979, Pub. L. 96–39, Title II, § 201(a), 93 Stat. 194 (July 26, 1979), as amended by Pub. L. 96–490 § 2, 94 Stat. 2556 (Dec. 2, 1980) ("TAA"), Customs is required to value imported merchandise in order of: (1) the transaction value of the imported merchandise, (2) the transaction value of identical merchandise, (3) the transaction value of similar merchandise, (4) the deductive or, if timely requested, computed value of the imported merchandise, or (5) upon the basis of a method derived from one of the foregoing, "reasonably adjusted to the extent necessary to arrive at a value," subject to certain exceptions. 19 U.S.C. §§ 1401a(a) and 1401a(g). 19 U.S.C. § 1401(a)(b)(1) defines "transaction value of imported merchandise" as "the price actually paid or payable for the merchandise when sold for exportation to the United States" plus

> (A) the packing costs incurred by the buyer with respect to the imported merchandise;
> (B) any selling commission incurred by the buyer with respect to the imported merchandise;
> (C) the value, apportioned as appropriate, of any assist;
> (D) any royalty or license fee related to the imported merchandise that the buyer is required to pay, directly or indirectly, as a condition of the sale of the imported merchandise for exportation to the United States; and
> (E) the proceeds of any subsequent resale, disposal, or use of the imported merchandise that accrue, directly or indirectly, to the seller.

19 U.S.C. § 1401(a)(b)(1). The "price actually paid or payable" for imported merchandise

> shall be increased by the amounts attributable to the items (and no others) described in subparagraphs (A) through (E) only to the extent that each such amount (i) is not otherwise included within the price actually paid or payable; and (ii) is based on sufficient information. If sufficient information is not available, for any reason, with respect to any amount referred to in the preceding sentence, the transaction value of the imported merchandise concerned shall be treated, for purposes of this section, as one that cannot be determined.

Id. "Sufficient information" is such information that "establishes the accuracy" of, *inter alia,* the above amounts. 19 U.S.C. § 1401(a)(h)(2). The "price actually paid or payable" is defined as

> the total payment (whether direct or indirect, and exclusive of any costs, charges, or expenses incurred for transportation, insurance, and related services incident to the international shipment of the merchandise from the country of exportation to the place of im-

> portation in the United States) made, or to be made, for imported merchandise by the buyer to, or for the benefit of, the seller.

19 U.S.C. § 1401a(b)(4)(A).

In addition, under 19 U.S.C. § 1401a(b)(2)(A)(iv) transaction value is to be used "only if" the buyer and seller are unrelated or, if they are related, their transaction value is considered "acceptable." A related party transaction is "acceptable" as transaction value

> if an examination of the circumstances of the sale of the imported merchandise indicates that the relationship between such buyer and seller did not influence the price actually paid or payable; or if the transaction value of the imported merchandise closely approximates—
>
> > (i) the transaction value of identical merchandise, or of similar merchandise, in sales to unrelated buyers in the United States; or
> >
> > (ii) the deductive value or computed value for identical merchandise or similar merchandise;
>
> but only if each value referred to in clause (i) or (ii) that is used for comparison relates to merchandise that was exported to the United States at or about the same time as the imported merchandise.

19 U.S.C. § 1401a(b)(2)(B). Values used for comparison must take into account, "based on sufficient information whether supplied by the buyer or otherwise available to the customs officer concerned," differences in commercial levels, quantity levels, the "costs, commissions, values, fees, and proceeds" described in 19 U.S.C. § 1401a(b)(1)(A)–(E), and any cost differences in unrelated sales by the seller (if such are used as a basis for comparison). 19 U.S.C. § 1401a(b)(2)(C).

"Deductive" value is defined as the resale price of imported merchandise in the United States less amounts associated with general expenses and profits, transportation, customs clearance, and customs duties and certain fees. 19 U.S.C. § 1401a(d). Deductive value requires consideration of "the unit price at which the merchandise is sold in the greatest aggregate quantity at or about" the date of importation. 19 U.S.C. § 1401a(d)(2)(A). The "greatest aggregate quantity" unit price is "the unit price at which such merchandise is sold to unrelated persons, at the first commercial level after importation * * * in a total volume that is (i) greater than the total volume sold at any other unit price, and (ii) sufficient to establish the unit price." 19 U.S.C. § 1401a(d)(2)(B). This price is then reduced by (i) "any commission usually paid or agreed to be paid, or the addition usually made for profit and general expenses" in connection with U.S. sales of imported merchandise "of the same class or kind * * * as the merchandise concerned"; (ii) the costs of transporting and insuring the international shipment of the merchandise; (iii) the costs of transporting and insuring from the U.S. border to the place of delivery (if not already excluded by (i)); and (iv) customs duties and Federal taxes

payable on the merchandise by reason of its importation. 19 U.S.C. § 1401a(d)(3)(A)(i)–(iv). In addition,

> profits and general expenses shall be based upon the importer's profits and general expenses, unless such profits and general expenses are inconsistent with those reflected in sales in the United States of imported merchandise of the same class or kind, in which case the deduction shall be based on the usual profit and general expenses reflected in such sales, as determined from sufficient information.

19 U.S.C. § 1401a(d)(3)(B). Finally, if not already included, any packing costs incurred by the importer or U.S. buyer must be added to such figure. 19 U.S.C. § 1401a(d)(3)(C).

By contrast, "computed" value is defined as the sum of

> (A) the cost or value of the materials and the fabrication and other processing of any kind employed in the production of the imported merchandise;
> (B) an amount for profit and expenses equal to that usually reflected in sales of merchandise of the same class or kind as the imported merchandise that are made by the producers in the country of exportation for export to the United States;
> (C) any assist, if its value is not included under subparagraph (A) or (B); and
> (D) the packing costs.

19 U.S.C. § 1401a(e)(1). Furthermore, as with deductive value,

> the amount for profit and general expenses * * * shall be based upon the producer's profits and expenses, unless the producer's profits and expenses are inconsistent with those usually reflected in sales of merchandise of the same class or kind as the imported merchandise that are made by producers in the country of exportation for export to the United States, in which case the amount * * * shall be based on the usual profit and general expenses of such producers in such sales, as determined from sufficient information.

19 U.S.C. § 1401a(e)(2)(B).

I

Before comparing the transfer prices between VWPC and VWPA against test values to determine their acceptability as transaction values, it is necessary to consider whether the expense of operating VWPA and the selling commissions paid to Concept III ("Concept") for U.S. representation are to be considered additions to or a part of the price paid for the VWPC-VWPA transactions. That necessitates, once again, examination of the commercial relationship involved. The "charge back" expenses and the commissions paid to Concept are addressed separately.

A

The "charge back" expenses included customer and clerical services (communication and telephone expenses, office rent, stationary, and ac-

counts receivable insurance), management fees, and data processing. The plaintiff asserts that VWPA's financial statements, audited by an internationally recognized accounting firm, establish that these expenses were billed monthly[3] by VWPC to VWPA and paid separately from the invoices for the imported fabrics. The plaintiff argues that there should be no legitimate dispute as to the "nature" of the charges which it alleges were recorded on the companies' books separately from transfer payments for the imported merchandise. Plaintiff's Memorandum Addressing the Issues on Remand ("Pl.'s Br.") at 1, 5–7, referencing Pl.'s Exs. 58, 60 and Trial Transcription ("Tr.") at 174, 272.

The five different categories of payments in 19 U.S.C. § 1401a(b)(1)(A)–(E) which must be added to the "price actually paid or payable" to arrive at transaction value are packing costs, selling ommissions, assists, royalties and license fees, and the "proceeds of any subsequent resale." The plaintiff argues this was written in such a way as to exclude all other expenses: "[t]he price actually paid or payable * * * shall be increased by the amounts attributable to the items (*and no others*) described in subparagraphs (A) through (B)." Pl.'s Br. at 9 (Plaintiff's highlighting). The plaintiff contends that none of the "charge backs" in issue fit within the categories delineated and that the "official" published position of Customs is that a

> separate fee paid to a related party seller for the following services is not part of the price actually paid or payable since the fee is unrelated to the manufacture of the imported merchandise: management services, accounting, finance, planning, and clerical activities.

Pl.'s Br. at 10, quoting *Encyclopedia of Customs Valuation Terminology* 101 (1996) summarizing HQ 543512 (Apr. 9, 1985). The plaintiff asserts that Customs has been "consistent" in this position from enactment of the transaction value statute in 1979 to the present. Pl.'s Br. at 10, referencing HQ 542122 (Sep. 1, 1980), C.S.D. 81–64, 15 Cust. B. & Dec. 862 (1981), and HQ 545420 (May 31, 1995).

The government disagrees, arguing that the expenses in issue are part of "the total payment * * * made * * * for imported merchandise by the buyer to, or for the benefit of, the seller," 19 U.S.C. § 1401a(b)(4)(A), and/or must be added to transaction value in accordance with one or more provisions of 19 U.S.C. § 1401a(b)(1)(A)–(E). Def.'s Br. at 21–25. For support, the government refers to *Nissho Iwai American Corp. v. United States*, 16 CIT 86, 94, 786 F. Supp. 1002, 1010 (1992), *rev'd on other grounds*, 982 F.2d 505, 512 (1992), *Generra Sportswear Co. v. United States*, 905 F.3d 377, 380–381 (Fed. Cir. 1990), and *Moss*

[3] There was no documentation submitted into evidence of payments from VWPA to VWPC except for Pl.'s Ex. 60, which provides a yearly total of such payments.

Manufacturing Co. v. United States, 896 F.2d 535, 539 (Fed. Cir. 1990).[4] The government emphasizes that the common thread of these cases is that payments were included in transaction value because they accrued directly or indirectly to the seller by reason of the manufacture *or sale* of imported merchandise. Def.'s Br. at 21–22.

Nissho Iwai mandated customs duty on accounts receivable insurance paid by the U.S. importer which had not been included as a part of the "first tier" transaction with the related-party seller. 16 CIT at 94. The government contends that *Nissho Iwai* is in accordance with the statutory definition of "price actually paid or payable," 19 U.S.C. § 1401a(b)(4), because the insurance payments therein were part of the "total payment" paid by the buyer for the merchandise and accrued directly or indirectly to the seller, and it argues that the situation here is analogous. Def.'s Br. at 21. Similarly, the government characterizes *Generra* as requiring additions to transaction value of payments which were made by the buyer to the seller independently of the invoiced price of the goods where such payments are not specifically excluded from transaction value by statute. *Id.* at 22, referencing 905 F.2d at 380.[5]

The plaintiff asserted on appeal that the charges here at issue had "nothing to do with the import transactions, but were simply general overhead expenses arising from services provided by VWPC and properly charged to VWPA."[6] It responds here that the government's brief "mischaracterizes administrative services subcontracted to VWP[C] by VWPA as having been for the benefit of VWP[C]" when "it is clear from the record these services were for the benefit of VWPA and their cost was properly recorded on VWPA's books as part of the cost of doing business." Pl.'s Rep. at 6–7. *See* Tr. at 378, 388. The plaintiff points out that *Chrysler Corp. v. United States*, 17 CIT 1049 (1993), relying on *Generra*, found that certain "shortfall" and "special application" fees paid by the buyer to the seller were determined not to constitute part of the price actually paid or payable under 19 U.S.C. § 1401a(b)(4)(A). The plaintiff contends that the *Chrysler* fees were independent and "unrelated to any specific merchandise" and that therefore they are similar to the expenses here in issue, whereas the "payments for quota fees in *Generra* were *necessary preconditions* to the exportation of the merchandise be-

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[4] In *Nissho Iwai*, a claimed deduction from transaction value for accounts receivable insurance, paid by the U.S. subsidiary-importer, was disallowed on the ground that it protected the importer from breach of contract by the U.S. buyer, not from loss of goods in international transit. 16 CIT at 94, 786 F. Supp. at 1010 (1992). *See* 19 U.S.C. § 1401a(b)(4). In *Generra*, Customs' regard of export quota charges as payment "for imported merchandise" was considered "permissible construction" of 19 U.S.C. § 1401a(b). 905 F.3d at 379–380. In *Moss*, an amount paid to an importer's overseas buying agent, who "assisted in bringing about the sale," was considered part of the payment "for goods." 896 F.2d at 538–539.

[5] The government contends that *Generra* necessarily distinguished *McAfee v. United States*, 842 F.2d 314 (Fed. Cir. 1988) because *McAfee* had relied on *United States v. Getz Bros. & Co.*, 55 CCPA 11 (1967), which in turn had been decided under "export value," the statutory predecessor of "transaction value." According to the government, "export value" had not permitted the addition of quota charges "because they were not part of the objective standard of export value," however it argues that Congress intended "transaction value" to encompass quota charges as part of "the price actually paid or payable." The government also states that "*Generra* was careful to note that this holding did not effect *Getz*'s requirement of the use of a valid first level sale rather than a second level sale. Rather, even if one uses a first level sale under *McAfee* and *Nissho*, there are certain mandatory additions to the price that must be made in order to arrive at a proper [transaction value ("tv")], whether it is the tv for the merchandise in issue or the tv that must be used for comparison purposes in related party transactions." Def.'s Br. at 22.

[6] *See* 175 F.3d at 1340 (citation omitted).

cause without the requisite quota the merchandise could not be exported to the United States." *Id.* at 2. (italics added).

Whether a particular transaction provokes liability for customs duties depends upon its relevance to importation. *Generra* instructs that so "long as the * * * payment was made to the seller in exchange for merchandise sold for export to the United States, the payment properly may be included in transaction value, even if the payment represents something other than the *per se* value of the goods. The focus of transaction value is the actual transaction between the buyer and seller." 905 F.2d at 380. But, to state that a payment is dutiable if it is "in exchange for" imported merchandise is to cut a wide swath. Consequently, Customs presumes that all payments made by a buyer to a seller are part of the price actually paid or payable for the imported merchandise, a presumption which may be rebutted by evidence which establishes that the payments are "completely unrelated" to the imported merchandise. *E.g.*, HQ 546638 (Oct. 4, 1999); HQ 545998 (Nov. 13, 1996), 1996 WL 910814 (1996). Nevertheless, the private ruling letters of Customs display varied and sometimes inconstant analyses on the dutiability of managerial and other "general" business expenses (*e.g.* arranging financing, accounting, administration, clerical activities, *et cetera*).

On the one hand, Customs has considered that managerial and/or general expenditures by a U.S. importer to its own agents acting on its behalf abroad[7], or for assistance with operations on United States soil by agents dispatched for the purpose by foreign related manufacturers or sellers,[8] are no longer dutiable "assists" under 19 U.S.C. § 1401a(b)(1)(C),[9] whereas charges for managerial and/or general expenses which are included in a price actually paid or payable for imported merchandise will not be deducted therefrom.[10] It has furthermore opined that in the absence of evidence of management fee payments between a U.S. importer and its related oversees exporter, there is no basis for including such payments in the appraised value of the imported merchandise.[11] On the other hand, Customs has apparently considered managerial or general payments to a related-party seller

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[7] *See, e.g.*, HQ 545420 (May 31, 1995); HQ 544421 (Apr. 3, 1990); HQ 544396 (May 14, 1990), C.S.D. 90–77, 24 Cust. B. & Dec. 495 (1990); HQ 543992 (Sep. 10, 1987); HQ 543820 (Dec. 26, 1986); HQ 542122 (Sep. 1, 1980), C.S.D. 81–64, 15 Cust. B. & Dec. 862 (1981). As generally articulated, "activities undertaken by a buyer on his own account, other than those for which an adjustment is provided [under 19 U.S.C. § 1401a(b)(1)], are not considered to be part of the price actually paid or payable, and payments for such services would not be added to the price actually paid or payable." HQ 544338 (Sep. 13, 1989).

[8] *See, e.g.*, HQ 543512, *supra*; HQ 054864 (Jan. 24, 1979), C.S.D. 79–280, 13 Cust. B. & Dec. 1405 (1979).

[9] An importer's assistance provided to the foreign manufacturer or seller was considered dutiable under prior law. *See, e.g.* HQ 651920 (Dec. 11, 1973). Under current law an "assist" includes any of the following if supplied free of charge or at reduced cost by the buyer, directly or indirectly, for use in connection with the production or the sale for export to the United States of the imported merchandise:

(i) materials, components, parts, and similar items incorporated in the imported merchandise;
(ii) tools, dies, molds, and similar items used in the production of the imported merchandise;
(iii) merchandise consumed in the production of the imported merchandise; and
(iv) engineering, development, artwork, design work, and plans and sketches that are undertaken elsewhere than in the United States and are necessary for the production of the imported merchandise.

19 U.S.C. § 1401a(h)(1). The value of an assist is to be apportioned in a "reasonable manner appropriate to the circumstances and in accordance with generally accepted accounting principles" and depending on documentation submitted by the importer. 19 C.F.R. § 152.103(e)(1) (1992).

[10] *E.g.* HQ 542122, 15 Cust. B. & Dec. at 864; HQ 545953 (Aug. 3, 1995).

[11] HQ 545522 (Apr. 26, 1995).

or exporter when commingled with purported payments for imported merchandise to implicate whether consideration passes from one entity to another, *i.e.*, whether the sale is *bona fide*.[12] And it has also considered that in the absence of evidence of a buying agency relationship between the importer and its offshore, related-party management-services contractor (unrelated to the overseas manufacturers from whom fabrics were procured), the procurement of "assists" and inspection services, a function of managerial duties, would be dutiable.[13] At a minimum, it would appear that the general interpretation of Customs is that characterization of an expense does not determine its dutiability, a position with which this Court would agree: the inquiry should focus on whether the expenditure proximately results in or is connected in some way to importation. If importation is the proximate result of an expense, however characterized, the expense is dutiable. *See Generra, supra*, 905 F.2d at 380. Conceptually, the economic "value" of merchandise in its state as imported would include all matters which accrue in advance and are incidental to placing it into the international stream of commerce.[14] Thus, for example, in *Chrysler* the "shortfall"and "special application" payments were triggered by non-performance on a contract, not importation. *See* 17 CIT at 1054. In the absence of importation, such payments appear akin to penalties or liquidated damages, and are not analogous to the circumstances here, where the value of the fabrics in their state as imported would have included all matters which proceeded receipt by VWPC on behalf of VWPA of purchase orders from customers in the United States via Concept. By contrast, subsection (E) of 19 U.S.C. § 1401a(b)(1) requires inclusion in transaction value of "the proceeds of any subsequent resale, disposal, or use of the imported merchandise that accrue, directly or indirectly, to the seller."[15] Obviously, all of VWPA's revenues were "proceeds" of the "subsequent resale, disposal, or use of the imported merchandise", some of which were remitted to VWPC for services rendered and fees expended in fulfilling VWPA's obligations to U.S. purchasers of Victor Woollen Product fabrics in advance of importation. The Court considers such payments to fall within the ambit of "proceeds"[16] in accordance with the plain meaning of 19 U.S.C. § 1401(a)(b)(1)(E). Customs requires proceeds to be "directly related"

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[12] *E.g.* HQ 545800 (June 28, 1996); HQ 543446 (Apr. 2, 1986); HQ 545571 (Apr. 28, 1995); HQ 543352 (June 11, 1984); HQ 542673 (June 10, 1982), C.S.D. 82-137, 16 Cust. B. & Dec. 946 (1982). *Cf. J.L. Wood v. United States*, 62 C.C.P.A. 25, 505 F.2d 1400 (1974).

[13] HQ 545420 (May 31, 1995). *Cf.* HQ 544423 (June 3, 1991); HQ 544976 (Mar. 17, 1993).

[14] "[T]he sale price of a product is the total of all value added by each step of the production process to that point. 'The value added of a loaf of bread is the sum of the value contributed at each stage of the production and distribution process. Among others, it includes the contribution of the farmer, miller, baker, wholesaler and retailer.'" *Trinova Corp. v. Michigan Dep't of Treasury*, 498 U.S. 358, 362 (1990) quoting Haughey, *The Economic Logic of the Single Business Tax*, 22 Wayne L. Rev. 1017, 1019 (1976). *See generally id.* at 362–365.

[15] Subsection (E) is sweeping, however Customs does not impute to a seller the proceeds of resale, disposal or use accruing through stock ownership but requires a direct relationship of such proceeds to the imported merchandise. *See* 19 C.F.R. § 152.103(g) (1992) ("[d]ividends or other payments from the buyer to the seller which do not relate directly to the imported merchandise will not be added to the price actually paid or payable").

[16] "Proceeds" are not merely "profits," they are "that which proceeds or results, as from a transaction; especially, the sum derived from a sale, venture," *et cetera*. *Webster's New Universal Unabridged Dictionary* 1434 (2d ed. 1983). Examples include "issues; income; yield; receipts; produce; money or articles or other thing of value arising or obtained by the sale of property; the sum, amount, or value of property sold or converted into money or into other property." *Black's Law Dictionary* 1204 (6th ed. 1990).

to importation to be dutiable. 19 C.F.R. § 152.103(g) (1992). It will therefore be instructed to include such proceeds as are appropriate for inclusion in the price actually paid or payable for the imported merchandise.

B

The government also contends that the dutiable transaction values of the merchandise in issue must also include the commissions which were paid to Concept. As a general principle, fees paid to a true buying agent, who represents and is controlled by the importer, are not dutiable, while payments which assist the seller are dutiable. *United States v. Bauer*, 3 Cust. Ct. Appl. 343, T.D. 32626 (1912). *Compare, e.g.*, HQ 545465 (Apr. 6, 1994) *with* HQ 545362 (May 31. 1994). There is no statutory exclusion for "buying commissions" in the TAA, however "transaction value" specifically includes (if not otherwise included) "any selling commission incurred by the buyer with respect to the imported merchandise." 19 U.S.C. § 1401a(b)(1)(B). "Selling commission" is not defined in the TAA. Since there is no legislative history discussing the term either, Customs has relied on the common law of agency to determine whether an agency relationship exists, and whether commissions paid to an agent are "selling commissions." *See Dutiability of "Royalty" Payments*, 1993 WL 500065 (Jan 21, 1993).

By regulation, "selling commission" is defined as "any commission paid to the seller's agent, who is related to or controlled by, or works for or on behalf of, the manufacturer or the seller." 19 C.F.R. § 152.102(b) (1992). Commissions paid to Concept for assistance with VWPC's direct sales to the U.S. apparently would have been dutiable prior to November 1989 under transaction valuation. After November 1989, Concept continued to earn commissions on U.S. sales, and these were purportedly paid monthly from the account of VWPA. No documentary evidence of such payments was offered into evidence, however the total amount of the commissions appear as selling expenses on VWPA's 1992 and 1993 financial statements. *See* Pl.'s Ex. 58 at 7. The central question is whether the payments were for statutory "selling commissions" which were incurred "with respect to the imported merchandise." That depends upon whether Concept worked "for or on behalf" of VWPC during the time in issue, a matter of contract.[17]

The reorganization of the affairs of Concept, VWPC and VWPA, around November 1989, apparently occurred on a "gentlemen's agreement." It is their intention in the undertaking which controls interpretation and must be discerned. *See, e.g., Beta Systems v. United States*, 838 F.2d 1179, 1185 (Fed. Cir.1988); *Firestone Tire & Rubber Co. v. United States*, 444 F.2d 547, 551 (Ct. Cl. 1971); *Dorf International Inc.*

[17] 19 U.S.C. § 1401a(b)(1)(B) implicates "any selling commission," of course, not agency, and a commissioned "selling agency" may in fact be an independent contractor, *i.e.*, "a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking[, who] may or may not be an agent." Restatement (Second) of Agency § 2(3). *See* Harold G. Rauschlein and William A. Gregory, *Agency and Partnership* 4 (1979). Concept was described during trial as a sales "agent" or as a "representative," but with full authority to accept orders from U.S. purchasers. Since Concept's selling efforts were apparently self-guided and without VWPC's or VWPA's supervision, the evidence supports finding that it operated as an independent contractor. The distinction matters little here, however.

et al. v. United States, 61 Cust. Ct. 604, 611, 291 F. Supp. 690, 695 (1968). The entry documents submitted for review show formality in maintaining corporate separateness between VWPC and VWPA, and neither the commissions nor the charges the government advocates for dutiability were invoiced or otherwise specified as part of the VWPC-VWPA transfer price. However, an expressed price is only one indicia of the relevant import agreement. *See Chrysler Corp. v. United States*, 17 CIT 1049 (1993). Actions speak louder than words,[18] and where the parameters of agreement are unclear, conduct may manifest intention. *See, e.g., Prudential Insurance Company of America v. United States*, 801 F.2d 1295, 1297 (Fed. Cir 1986); *Blackhawk Heating & Plumbing Co. v. United States*, 622 F.2d 539, 551 (Ct. Cl. 1980); *Consumers Ice Company v. United States*, 475 F.2d 1161, 1165–1167 (Ct. Cl. 1973). In the case of inconsistency, conduct controls. *Wagner Electric Corporation v. United States*, 36 A.F.T.R.2d 75–5898, 1975 WL 3594 (Ct. Cl. Trial Div. 1975).

The Court's impression of the evidence adduced at trial is that activation of VWPA in 1989 did not appreciably alter Concept's perception of the entity it was assisting. At that point, Concept proceeded to write purchase orders on VWPA letterhead and was paid from VWPA's account, but as a general matter its day-to-day functions remained the same as it continued promoting and selling VWPC-made fabric, transmitting purchase orders to Canada, and trusting, apparently, that its monthly commission checks correctly reflected commissions earned. *See.* Tr. at 139. In general, the impression offered during trial by Mr. Paul Scher, a vice president of and partner in Concept, was that Concept dealt with "Victor," a company comprised of geographically dispersed business units.[19] The selling material used by Concept tends, if it tends, towards the impression left by Mr. Scher.[20] It is also of some significance that VWPC, through its personnel, directly promoted sales to U.S. customers by assisting Concept with client meetings as needed.[21] An overall impression is that VWPC intended to be, and was, benefitted to the extent its personnel were successful in stimulating U.S. sales. *See Young & Rubicam, Inc. v. United States*, 410 F.2d 1233, 1239 (Ct. Cl. 1969).

Given the apparent conduct of VWPC and/or Concept's perceptions of the bargain, the Court is unable to distinguish commissions paid to Con-

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[18] *See, e.g., Forest of Dean Iron Ore Co. v. United States*, 106 Ct. Cl. 250, 65 F. Supp. 585, 587 (1946).

[19] *See, e.g.*, Tr. at 196–197, 203–205, 207–209, 211–212, 214, 219–220 (Testimony of Paul Scher).

[20] Pl.'s Ex. 41, a pictorial brochure, was testified as showing the products of the various "mills" Concept represents, in particular, as the question was posed by counsel, "Victor Woollen Products." Tr. at 199. Plaintiff's Exhibit 42, described as the business card Concept uses in the representation of "various mills," lists "Victor Woollens (USA)." *See* Tr. at 200, 209–210. Plaintiff's Exhibits 40 and 43 through 48 are three-panel folders of bound swatches each containing as many as 30 or more colors of a particular fabric weight or type. Each folder displays an identical four-color face and back cover and similar layout. The fronts of four folders show "VICTOR" in bold type across a picture of a mechanical loom surrounded by rolls of fabric; the other two folders display "CLUB JACKET" across a drawing of a figure wearing a varsity jacket. In bold print towards the bottom of the front of these two folders appears "Victor." On the reverse of all the folders is printed in smaller type "VWP of America Inc." along with its Jackman, Maine post office box. All folders have written vertically along the right edge (in small pitch) "Printed in Canada". The two "CLUB JACKET" folders also display "Imprimé au Canada," and one of these folders also displays the name and address for Concept below Plaintiff's name and address. At the bottom are phone and fax numbers. This juxtaposition of "VWP of America" and Concept also appears on Plaintiff's Exhibit 49, a plaid swatch bound on a plastic hanger by a four-color display similar to those of the folders. Mr. Scher referred to the advertisements on direct examination as representing "Victor" or "VWP of America." Tr. at 200–203.

[21] *See* Tr. at 210–213, 216–218.

cept as relating "solely" to VWPA's U.S. sales.[22] Concept exercised the power and, apparently, the authority to bind the sales which resulted between VWPC and VWPA as a consequence of its U.S. selling efforts. *Cf.* HQ 544949 (Mar. 17, 1993). Accordingly, the Court finds that Concept worked "for or on behalf of" VWPC as well as VWPA during the time in issue and that the commissions paid to Concept were incurred "with respect to the imported merchandise." The amounts are to be added to the claimed transaction values in accordance with 19 U.S.C. § 1401a(b)(1)(B).

C

Lastly on the issue of charge-backs and commissions, the government contends the VWPC-VWPA transaction values cannot be determined because the expenses borne by VWPC and charged back to VWPA and the commissions paid to Concept were allocated over the entire fiscal period, not "per sale," and that because inconsistencies between the summary data and the back up data which were submitted were never resolved to Customs' satisfaction. Def.'s Br. at 22–23. Because the government raises the argument primarily with respect to the plaintiff's deductive and computed values, this issue will be considered in that context.

II

Assuming *arguendo* that the VWPC-VWPA transaction values can be accurately determined, they are to be compared with the values indicated on certain entry documents relating to transactions between Cookshiretex and Lou Levy & Sons. The appellate decision requires determination of (1) whether Cookshiretex and Lou Levy & Sons are unrelated parties,[23] (2) whether the Cookshiretex-Levy merchandise was "identical" or "similar" to the VWPC-VWPA merchandise,[24] and (3) whether the VWPC-VWPA transaction value "closely approximated" the Cookshiretex-Levy transactions. Column 33 of the Cookshiretex

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[22] *See Prudential Insurance Co. v. United States*, 801 F.2d 1295, 1297 (Fed. Cir. 1986) (a contract implied in fact is "inferred as a matter of reason or justice from the acts or conduct of the parties." *Cf. Copperweld Corporation v. Independence Tube Corporation*, 467 U.S. 752, 771 (1984); *Clougherty Packing Co. v. Commissioner*, 811 F.2d 1297, 1301 (9th Cir. 1987). It may be noted that in HQ 545998, *supra*, Customs considered the dutiability of payments from an importer to a related-party promoter pursuant to a "co-promotion" agreement. The imported merchandise was an active medicinal ingredient which was combined in the United States with other ingredients to form a finished product which was marketed by the importer with the assistance of the related party. The "co-promotion fee" of the related party was a complex formula determined in accordance with a written co-promotion agreement provided to Customs. The appraiser took the position, with which Headquarters agreed, that the fees were not associated with the sale for exportation of the imported merchandise but were "based upon" the specific undertakings of the related party in promoting the sale of a brand name product finished in the United States. Headquarters also concluded that the "price actually paid or payable" to the exporter/seller was kept "entirely separate" from the co-promotion fee paid to the related party. 1996 WL 910814 at *11–*13. Suffice it to state that unlike HQ 545998, the apparent arrangement between Concept and Victor Woollen Products supports the conclusion here.

[23] Entities may "qualify" as "related parties" under the appellate decision. 175 F.3d at 1335–1338. Related parties have traditionally borne a higher burden, *e.g.* in relation to claimed export value. *See, e.g., New York Credit Men's Adjustment Bureau, Inc. v. United States*, 64 Cust. Ct. 770, 314 F. Supp. 1246 (1970), *aff'd* 68 Cust. Ct. 319, 342 F. Supp. 745 (1972).

[24] "Identical merchandise" for purposes of this related-party matter means "merchandise that is identical in all respects to, and was produced in the same country as, but not produced by the same person as, the merchandise being appraised." 19 U.S.C. § 1401a(h)(2)(B). "Similar merchandise" for purposes of this related-party matter means merchandise that "is like the merchandise being appraised in characteristics and component material," "is commercially interchangeable with the merchandise being appraised," and " was produced in the same country as, but not produced by the same person as, the merchandise being appraised." 19 U.S.C. § 1401a(h)(4)(B).

entry summaries answers the first question in the affirmative. *See* Pl.'s Br. at 13 n.3. Direct testimony was only to the point that VWPC and Cookshiretex are "competitors," but since nothing of record overcomes the presumption of correctness on the Cookshiretex entries, the matter resolves in favor of the plaintiff.

The difference between the entry dates of the plaintiff's plaids and the Cookshiretex plaids was approximately two months. The difference between the entry dates of the compared meltons was approximately four months. The government therefore challenges whether these differences constituted U.S.-bound export "at or about the same time as the imported merchandise" being appraised, arguing that the 90-day limitation in 19 U.S.C. § 1401a(d)(2)(ii) defines the extent of "at or about" in the context of 19 U.S.C. § 1401a(b)(2)(B). Def.'s Br. at 7–8. *See* 19 U.S.C. §§ 1401a (b)(2)(B) and (c)(1)(B). The Court disagrees. "At or about" requires only proximity in time, and for purposes of this matter the concern is only as to the time value of money. The entry summary and manufacturer's single country declaration[25] on Cookshiretex exhibit E–2 indicate only that the currency of settlement is "$" which obfuscates without clarification,[26] however the other Cookshiretex exhibits indicate the currency of settlement as US Dollars, and it therefore appears reasonable to assume that Cookshiretex exhibit E–2 follows this pattern. Rates of inflation over the period(s) under consideration in the U.S. market for the merchandise concerned are also relevant, however evidence of such has not been provided by either party.[27] To support any determination here, the Court takes judicial notice of the producer price index for "woolen" products in the U.S. published by the Bureau of Labor Statistics, U.S. Department of Labor.[28] *Cf. Van Gelder-Fanto Corp. v. United States,* 41 C.C.P.A. 90, C.A.D. 534 (1953). Woolen product price differences between July 1992 and February 1993 in the U.S. (*i.e.* the period covered by this test case and including the relevant months for entry of the fabrics described in Defendant's Exhibits E–2 and E–7) were not significant and somewhat deflationary. On this basis, the Court concludes that the Cookshiretex entries offered for comparison were exported to the United States "about the time" that the fabrics described by the subject entries were exported to the United States. *See United States v. Reiner, Inc.,* C.D.C. 370, 35 CCPA 50, 50–57 (1947).

The Cookshiretex entries do not describe fabrics "identical" to the VWPC fabrics, since they vary by weight and wool content among other factors. *See* 19 C.F.R. § 152.102(d) (1992). To show that the Cookshire-

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[25] *See* 19 C.F.R. § 12.130(f)(1) (1992).

[26] Exchange rate examination is obviated where comparative transactions are stated in US Dollars. *See, e.g., AIMCOR et al. v. United States,* 141 F.3d 1098, 1110–1111 (Fed. Cir. 1998)

[27] The government argues "there is clear evidence there were significant price fluctuations in the United States market during this period," apparently in reference to the fact, mentioned later in its brief, that certain of the plaintiff's U.S. sales were "higher than those used by VWPA" in the calculation of deductive values. *See* Def.'s Br. at 10, 13, referencing Pl.'s Exs. 9, 17 and 34. The argument, however, does not establish that circumstance as an appropriate comparative benchmark.

[28] The producer price indices for woolen products published by the Bureau of Labor Statistics, U.S. Department of Labor for July 1992, December 1992, and January 1993, were 104.9, 104.4, and 104.4, respectively (base year 1985 = 100). *See* BLS Series ID PCU2231#316.

tex-Levy entries are "similar" to the VWPC-VWPA entries, the plaintiff compared a 17-ounce, 65% wool plaid from Cookshiretex exhibit E–2 against a VWPC 18/20-ounce, 60% wool plaid from Plaintiff's Exhibit 9 at page 25, and it compared 22-ounce, 80% wool navy and purple meltons from Cookshiretex exhibit E–7 against VWPC 23/25-ounce 75% wool navy and purple meltons from Plaintiff's Exhibit 9 at pages 13 and 19.[29] On the subject of commercial interchangeability, Mr. Duval's responses were somewhat contradictory, however in the end he stated:

> [M]ost [U.S.] customers won't * * * see very much difference for a three, four, five percent difference in the blends. Unless you are talking about [comparing] 100 percent wool and then 95, because then at 95 you cannot use a Woolmark and at 100 percent wool you can use a Woolmark. So that makes a difference there, but not 80 percent or 75 percent, even most of the time at 70 percent. Because we see that very often in the market [for] melton fabrics, 70 percent, 75, 80 percent sold at about the same prices at [*sic*] the customers.

Tr. at 72–73. Suffice it to state that the two VWPC-to-Cookshiretex comparisons fell within the five percent range of wool content adduced by Mr. Duval.

The government challenges the usefulness of the Cookshiretex exhibits for comparative purposes. The Cookshiretex plaid chosen from exhibit E–2 for comparison was a blend of 65% wool, 30% acrylic and 5% nylon, whereas the VWPC plaid chosen from Plaintiff's Exhibit 9 consisted of 60% wool, 25% polyester, and 10% acrylic. The government argues there was no evidence put forth that the 20% difference in acrylic content or the 25% polyester (in place of acrylic and nylon) content was acceptable or commercially interchangeable or that garments manufactured from the VWPC fabric were comparable or commercially interchangeable with garments manufactured from the fabric imported by Lou Levy & Sons. Def.'s Br. at 8–9. The government claims the "variety and breadth of outerwear (*e.g.* male *versus* female, formal *versus* athletic) is so great that simply stating that the wool content was similar does not constitute proof that the merchandise is at all similar or commercially interchangeable." *Id.* at 9.

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[29] Noting that the Cookshiretex fabric was "less heavy so there [are] less fibers in it, less processing," Tr. at 80, the plaintiff's witness, Mr. Duval, assumed the VWPC plaid chosen for comparison weighed an average of 19 ounces, or 89% of the Cookshiretex plaid. *See* Pl.'s Ex. 9 at 25. Multiplying the price of the VWPC plaid by this factor, a "comparable" VWPC fabric was derived which Mr. Duval stated was 27 cents higher than the price of the "similar" Cookshiretex merchandise sold to Lou Levy & Sons. He then performed a similar comparison with respect to a navy melton in Cookshiretex exhibit E–7. This exhibit pertained to 42 "pieces" (*i.e.* rolls) of a 58/59 inch-width, 22-ounce weight ("per linear yard"), 80% wool, 15% nylon, 5% other fibers, which entered on July 30, 1992. Of those pieces, 34 rolls, "2,100.90 mts" in length, were sold at a particular cost-insurance-freight ("CIF") price per square length. Mr. Duval testified that the CIF price was "per meter" and that a "comparable" VWPC fabric is listed on Plaintiff's Exhibit 9 at page 13 as a 23/25-ounce navy melton, 75% wool, 20% nylon, 5% other fibers. The invoice in Cookshiretex exhibit E–7 is illegible as to the per-length price, however the customs broker of the Cookshiretex fabric invoiced the CIF price as "per linear yard." *Compare* Cookshiretex exhibit E–7, p. 3, *with* p. 4. At any rate, Mr. Duval adjusted the Cookshiretex fabric into a "per-yard" CIF price by dividing by 1.0936 (the claimed ratio of meters to yards), which reduced the Cookshiretex navy melton CIF price by 37 cents. Tr. at 86. Next, Mr. Duval stated the difference in the weights of the fabrics was a factor of 0.9167 (22 ounces versus 24 ounces, average weight). Multiplying the VWPC-VWPA navy melton price by this factor, Mr. Duval stated the VWPC-VWPA price of a "comparable" fabric, so derived, was 41 cents higher per yard than the Cookshiretex price to Lou Levy & Sons of "similar" merchandise, as adjusted. The Court calculates that the VWPC-VWPA price would have been 4 cents higher if the Cookshiretex navy melton price had been unadjusted. Mr. Duval conducted a similar analysis with respect to the Cookshiretex purple melton listed on Cookshiretex exhibit E–7 versus the VWPC purple melton listed on page 19 of Plaintiff's Exhibit 9 and concluded identical price difference(s). Tr. at 88.

The inquiry here, of course, is the fabric in its state as imported, not the fabric as further processed. *See* 19 U.S.C. § 1401a(c)(2). The government's point may well be true, and the testimony of the plaintiff's witness might be regarded as merely self-serving, however at trial the government's inquiry into commercial interchangeability focused solely on the wool content of apparel fabric in the United States market. It did not test the plaintiff's witness with inquiry into other factors which might impact commercial interchangeability, nor did it bring forth import specialist or other rebuttal to challenge the plaintiff's assertion that the deciding factor for commercial interchangeability was wool content, nor did it challenge the plaintiff's method of comparing the Victor Woollen Product fabrics to the Cookshiretex fabrics. Accordingly, the Court regards the government's contention at this stage of the proceedings as speculation, and the plaintiff's proof on commercial interchangeability stands.

The government additionally asserts that Cookshiretex exhibit E–2 was likely for samples, and that a transaction for samples

> does not properly reflect upon the alleged arm's length nature of the[ ] style to which it is being compared, because there may be considerations that dictate a significantly lower price, outside the normal price structure for merchandise, in order to induce future large quantity sales of that fabric. This is best evidenced by VWPA's own invoices * * * which disclose[ ] that VWPA shipped sample merchandise at no cost.

Id. at 9–10, referencing Pl.'s Ex. 14 at 3, Pl.'s Ex. 21 at 3, and Pl.'s Ex. 22 at 3.[30] At the other extreme, the government contends that Cookshiretex exhibit E–7 involved a sale of over 2000 yards of material, whereas Plaintiff's Exhibit 9 describes only 152.50 yards of navy melton and 71.625 yards of purple melton. It argues that 19 U.S.C. § 1401a(b)(2)(C)(ii) mandates that differences in quantities must be taken into account based on "sufficient information," that if sufficient information is unavailable then the comparison cannot be made, that the plaintiff admitted discounts are provided for large-quantity sales, and that one cannot compare the two different volume transactions here because the price for the Cookshiretex transaction is, arguably, significantly less than that for transactions in smaller quantities such as the VWPC-VWPA transactions for the navy and purple meltons. *See* Def.'s Br. at 10, referencing Tr. at 103, 147, and 167. "For all we know," according to the government, "the unusually favorable price to Levy may have occurred because Levy purchased a close out of old stock." *Id.* at 11. *See generally* Tr. at 90–98, 100–103, 178.

The plaintiff argues that VWPA is a distributor which purchased about 1 million yards of apparel fabric over the year, whereas Lou Levy

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[30] The government additionally notes that Mr. Duval's statement to the effect that sample fabric is not sold at lower prices than sales of regular quantities but in many instances is sold at higher prices is undermined by these exhibits. Def.'s Br. at 10 n.1. The VWPA-U.S-purchaser sale price of the particular plaid being compared, at any rate, was greater than twice the price of the Cookshiretex plaid purchased by Lou Levy & Sons. *Compare* Pl.'s Ex. 9 at 21 *with* Cookshiretex exhibit E–2; *see* Def.'s Br. at 6, Tr. at 100–101.

& Sons is an apparel manufacturer which purchased an estimated 5,000 to 10,000 yards of fabric per year. It argues that the differences in quantity and the commercial level of the respective transactions would only result in downward adjustment of the Cookshiretex-Levy prices, thus rendering the VWPC-VWPA prices even more favorable. Pl.'s Rep. at 7 n.3.

The statute requires consideration of and, as necessary, adjustment to the price of the Cookshiretex-Levy transaction to compensate for any volume effect on price, not the VWPC-VWPA transaction. *See* 19 U.S.C. § 1401a(b)(2)(C); 19 C.F.R. § 152.104 (1992). To approximate the quantity of the VWPC-VWPA sale, adjustment to the Cookshiretex-Lou Levy transaction to compensate for any volume discount would have been upward, not downward. The only testimony on the matter, however, concerns VWPA's volume discounts to end users,[31] and it would be speculative to consider whether the 2000-yard Cookshiretex transaction entailed an actual volume discount or what such an adjustment would have involved. *See* Tr. at 91. The Court considers that once the plaintiff's witness asserted that comparison of the transactions was appropriate, the burden shifted to the government to rebut. *See* 19 U.S.C. § 1401a(b)(2)(C) (commercial and quantity differences effecting the sale price are to be taken into account "whether supplied by the buyer or otherwise available to the customs officer concerned"). *See also S. Stern, Henry & Co. v. United States*, C.D. 3951, 64 Cust. Ct. 1, 308 F. Supp. 712, 716 (1970); *M.B.I. Merchandise Industries Inc. v. United States*, 16 CIT 495, 502 (1992). *But cf. Border Brokerage Company v. United States*, R.D. 10759, 52 Cust. Ct. 567 (1964) (evidentiary standard for proving for usual commercial quantities). The government did not cross examine as to commercial or quantity differences or bring forth an import specialist who might have clarified the issue. Thus, there is no reason to conclude that the quantity differences implies the Victor Woollen Product fabrics and the Cookshiretex fabrics are not "similar," and the fabric comparisons are not invalidated on the basis of the government's arguments.

On the other hand, the plaintiff contends that a "proper analysis would compare the total quantities of each of the Cookshiretex-Levy fabrics with the total quantities of the comparable VWPC-VWPA fabrics demonstrated by the record." Pl.'s Rep. at 7, referencing Pl.'s Conf. App. I. The Court agrees, although such a statement might be construed as an admission that Mr. Duval's comparisons were insufficient, however the Court is unable to compare the total quantities of "each" of the Cookshiretex-Levy with the total quantities of "the comparable" VWPC-VWPA fabrics. Mr. Duval himself stated that except for Cookshiretex exhibits E–2 and E–7, the exhibits were lacking too many terms in order to make useful comparisons with the Victor Woollen Product fabrics at issue here. *See* Tr. at 75–77, 81–83. *See, e.g.*, Cookshiretex exhibit E–1 at 3.

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[31] *See* Tr. at 103, 147, and 167.

There was furthermore insufficient information put forth from which the Court might make meaningful comparisons on its own.[32] From the evidence presented, thus, the plaintiff has demonstrated that the Cookshiretex exhibit E–7 melton is "similar" to and therefore comparable with 0912 Color meltons but not 0912 Natural fabrics or other VWPC meltons, and it has also demonstrated that the Cookshiretex exhibit E–2 plaid is "similar" to and therefore comparable with the C9217/1 plaid in Plaintiff's Exhibit 9, but it would be for Customs to determine, in the first instance, whether the transfer prices of the VWPC-VWPA transactions, adjusted in accordance with the foregoing, "closely approximate" these two Cookshiretex-Levy transactions in accordance with 19 U.S.C. § 1401a(b)(2)(B). If remand is necessary, Customs is not precluded from making additional comparisons, as appropriate, provided it does not restrict the applicability of the foregoing.

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[32] The plaintiff submitted two price lists showing transfer prices from VWPC to VWPA for the 1991–1992 fiscal year and the 1992–1993 fiscal year (fiscal year beginning December 1st). Pl.'s Exs. 4, 5. *See* Pl.'s Ex. 58. The price list for the 1991–1992 fiscal year lists only prices of melton, and these are apparently grouped into seven price categories ("P591," "0812 Natural," "0812 Color," "0912 Natural," "0912 Color & 189," "159 & 1959," and "90 Melton Dark"). The price list for the 1992–1993 fiscal year also lists these categories (although the sixth is listed as "159 & 1159") and also adds "Others" which includes "Baron & 1000," "Duffle 14," "WN008," "WN012 Light," "F8963 (20/22)," "F9018 (22/24)," "C9108 (18/20)]," "WP090," "C9209 (14/16)," and "C9209 (16/18)." Pl.'s Ex. 5. It is unclear what "Others" are, but the documents show melton prices as having increased in each category by the same amount as compared with fiscal year 1991–1992 prices. The Court does not doubt the accuracy of the 1992–1993 price list, however a comparison with Plaintiff's Exhibits 6 through 40 shows that it is apparently incomplete and not always a reliable indicator of actual pricing. For example, the navy and purple meltons which were compared with Cookshiretex exhibit E–7 are in the "0912 Color" category. Two representative samples of 0912 transfer prices (for "Natural" and "Color") that occurred on May 21th and 25th, 1993 at the 1992–1993 price-list prices were submitted attached to the 1992–1993 price list, however entry of "0912 Color" and "0912 Natural" meltons also occurred on those dates at the 1991–1992 sale prices. *See* Pl.'s Exs. 6, 8, 11, 15, 16–17, 19, 22, 25, 27, 33–36, 38–40; Def.'s Ex. 5. VWPC also priced at least three fabrics to VWPA at the retail price to the U.S. purchaser. *See* Pl.'s Exs. 6 at 11–12, 34 at 16–17. The VWPC plaid compared with Cookshiretex exhibit E–2 was an 18/20-ounce "C9217" which appears nowhere on the 1992–1993 price list. The 1992–1993 price list shows plaids increasing in price as weight increases and the nearest comparable item may be the 18/20-ounce "C9108", however the entry documents show that VWPC and VWPA transacted both 18/20-ounce/yard plaids and 14/16-ounce/yard plaids at the same per-yard price which, for that matter, was 25 cents higher than the indicated price for "C9108." *Compare* Pl.'s Ex. 5, Cookshiretex exhibit E–2, *and* Pl.'s Ex. 9 at 25. Mr. Duval testified that the absence of certain terms in Cookshiretex exhibits E–1 and E–3 through E–6, for example color, rendered them useless for purposes of comparison. Tr. at 74, 76. The exhibits, deemed admissible, yield information nevertheless. Cookshiretex exhibit E–1 indicates entry of 165.29 yards 21-ounce/yard 80% wool melton for samples on December 21, 1992. The peryard price of this fabric, by weight slightly lighter than VWPC 0912 meltons but containing 5% more wool, is almost identical to the transfer price between VWPC and VWPA of the "0912 Color" category. Cookshiretex exhibits E–3 through E–5 entered between July 30, 1992 and November 27, 1992 and describe 21-ounce/yard 80% wool melton which sold in volume far in excess of that of the plaintiff's transactions at an identical declared price per yard, nearly midway between inter-company listed prices for "0912 Color" and "0912 Natural." Also, the difference in price between "0912 Color" and "0912 Natural" meltons, based on either the 1991–1992 price list or the 1992–1993 price list, is substantial, as are the differences in volume and pricing of these Cookshiretex entries, whose entry documents, at any rate, indicate no color terms. Cookshiretex exhibit E–6 entered October 16, 1992 and describes 9 rolls, apparently 2,438.78 yards, of 21-ounce/yard 65% wool "plaid" and 32 rolls, apparently 679.99 yards, of 22-ounce/yard 45% wool "Navajo." On the other hand, the perunit (yard) price of the entered Cookshiretex "plaid" was approximately 29% higher (adjusted for the difference in fabric weights) than the list price of VWPC's "C9108," the apparently nearest comparable fabric on the 1992–1993 price list (again, it being unclear whether and to what extent such constitutes a category of fabric). There was no evidence of similar merchandise for entries of tweeds, stripes and other fabrics not included on the 1992–1993 price list. The VWPC tweeds were entered between 50% and 60% wool, mostly 55%, and weighed between 20 and 22/24 ounces per yard. The stripes entered were all 75% wool and weighed between 18/20 and 22/24 ounces per yard. The plaintiff adduced at trial that the weight of a fabric was a significant indication of the amount of processing involved, Tr. at 80, however Plaintiff's Exhibits 6 through 40 indicate that price does not necessarily correspond therewith: striped fabrics with 75% wool may be priced higher than a heavier (ounce-per-yard) stripe with the same wool content; the "0912 Color" meltons apparently have the same weight and wool content as the "159" meltons, but the latter are priced substantially lower; and like the "0912 Color" meltons, the "0812 Color" meltons consist of 75% wool but weigh 19/20 ounces per square yard, are therefore 81.25% of the weight of the "0912 Color" meltons, but are list-priced at significantly less than 81.25% of the price of "0912 Color" meltons. Similarly, while many VWPC plaids of the same wool content were transferred to VWPA at the same price as the compared Cookshiretex exhibit E–2 plaid, a substantial number were transferred to VWPA at higher or lower prices, and not always due to apparent differences in wool content or weight. Compare, e.g., Pl.'s Exs. 9, 22, 23, 27–29, 35, 37. In short, it is impossible to extrapolate from Mr. Duval's comparisons to the record universe of Victor Woollen Product fabrics entered.

III

The plaintiff also offered deductive and computed value statements for comparison with the VWPC-VWPA transfer prices to prove the appropriateness of transaction valuation or as alternate bases of valuation. It contends that each statement accounts for all statutory profit and expense elements and were prepared in accordance with generally accepted accounting principles from the companies' actual accounting records.[33] The government raises several points with respect to the deductive and computed value statements. First, it argues that the evidence submitted in support of the deductive value statement did not relate the "greatest aggregate quantity" sales to "at or about the same time as the imported merchandise" in accordance with 19 U.S.C. § 1401a(b)(2)(B), which could have occurred as late as 10 months after the importations in issue, and it argues the computed value statement is similarly deficient because it "is not tied into the particular period of importations. Def.'s Br. at 13, 20; Tr. at 289, 292–295, 360–361. *See* 19 U.S.C. § 1401a(d)(2)(A)(i) and (ii); 19 U.S.C. § 1401a(d).

Second, the government argues that the exhibits supporting the deductive and computed value calculations are themselves summary information and that the plaintiff failed to provide the source documents either in response to discovery or at trial, a violation of Rule 1006 of the Federal

Rules of Evidence[34] and necessitating disregard of the deductive and computed value statements in accordance with *Conoco Inc. v. Department of Energy*, 99 F.3d 387, 393–394 (Fed. Cir. 1996) (opposing counsel must be afforded an opportunity to review and object to the underlying documents, in order to guard against the risk of error or distortion).

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[33] The Statement of Administrative Action to the Trade Agreements Act of 1979 ("SAA") which accompanied the URAA states that "the determination of usual profit and general expenses under the provisions of deductive value would be carried out utilizing information prepared in a manner consistent with generally accepted accounting principles in the United States." SAA at 460, reprinted in 1979 U.S.C.C.A.N. 665, 721. Regarding the computed value statement, the plaintiff contends it was prepared in accordance with Canadian GAAP and cannot be rejected merely because different allocation methods might have been used. *See* 19 U.S.C. § 1401a(g)(3) ("information that is submitted by an importer, buyer, or producer in regard to the appraisement of merchandise may not be rejected by the customs officer concerned on the basis of the accounting method by which the information was prepared, if the information was in accordance with generally accepted accounting principles"). The plaintiff draws upon the legislative history of 19 U.S.C. § 1401a(g)(3) "to allow the importer, buyer, or producer to prepare his figures in any one of a variety of acceptable methods" and "aid not only the Customs Service, but the importer as well, since he would be able to rely more on his own records than under existing law." Pl.'s Br. at 18, quoting S. Rep. 249, 96th Cong., 1st Sess. 118 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 504, 508. *See also id* at 23 referencing *Merck, Sharp & Dohme, Int'l v. United States*, 20 CIT 137, 139, 915 F. Supp. 405, 408 (1996).

[34] Federal Rule of Evidence 1006 provides: "The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court."

Def.'s Br. at 13–15. *Cf.* Tr. at 235–239, 243–245, 248, 276–277, 321–326, 442–444.[35]

Third, the government takes issue with Victor Woollen Product's cost allocation methodology. Def.'s Br. at 18. The "costing" of fabrics for the U.S. market included material, direct labor, and indirect manufacturing or overhead costs the largest of which were management fees and administrative salaries allocated to VWPA. *See* Tr. at 233, 301–302, Pl.'s Ex. 60. The expenses allocated to VWPA were based upon the companies' total consolidated sales, which eliminated the effect of inter-company transfers and furthermore included VWPC's upholstery sales in Canada. The government argues that this is incorrect, that a proper ratio would have been based on total apparel fabric expenses to total apparel fabric sales, or total expenses including upholstery to total sales including upholstery, in either case on a non-consolidated basis because expenses were actually incurred upon inter-company transfer (according to testimony from Victor Woollen Products' accountant elicited during cross-examination). Def.'s Br. at 18–20. *See* Tr. at 313–315, 331–333, 420. *Compare* Tr. at 398–399 *with* Tr. at 416. The government points out that the witness for plaintiff's independent accountants could not specify the particular generally accepted accounting principles underlying the expense allocations and that he conceded, and that the effect of the methodology is to treat VWPA's sales and profits on the United States sales as part of VWPC's own sales and profit. Def.'s Br. at 20. *See* Tr. at 361–364, 419–420. Thus, that government argues, Victor Woollen Products' allocations are not in accordance with 19 U.S.C. § 1401a(d)(3)(i) and (f)(2)(C).. Def.'s Br. at 18–20. *See* Tr. at 316, 361.

Fourth, the government argues that Customs has "uniformly" required that any test values used to validate related-party transaction-value claims be "previously accepted." Def.'s Br. at 15, referencing HQ 543568 (May 30, 1986), HQ 546166 (Apr. 5, 1996), and HQ 546511 (Apr. 15, 1999). *See* 19 U.S.C. § 1401a(b)(2)(B). *See also* HQ 545481 (Sep. 14,

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[35] Regarding arguable inconsistencies and unsupported figures appearing in Plaintiff's Exhibits 50 to 61, the government points to the testimony of its auditor, who "just wasn't able to find where some of the numbers were coming from." Def.'s Br. at 14. *See* Tr. at 442–443. Specifically, the government points out that: (1) the cost per fabric for the 90 melton does not match the figures in the blend sheets that were part of the computed value statement, Tr. at 445 (*see* Exhibit 50 at "02"); (2) there was no factual basis for the fringe benefit rate asserted thereon, *id.* (*see* Exhibits 50, 53); (3) the numbers contained on some of the blend sheets for total quantities blended and for dyed yards were considerably lower than some of the numbers used in the calculations, *id.* at 445–447 (*see* Exhibit 50 at 2–4, Exhibit 52 at 24); (4) the division of research and development between fabric and upholstery differed from what was allocated onto Exhibit 50, Tr. at 448 (*see* Exhibit 52 at 9); (5) the costs used in the computed value calculations did not appear in the trial balance and ought to have appeared therein if they had been in fact incurred, Tr. at 448–449 (*see* Exhibit 52 at 25, Exhibit 53); (6) there was no back-up data for the production figure which appeared in Exhibit 52 at page 26, Tr. at 449; (7) there were expense accounts included in the trial balance which were not included in Pl.'s Ex. 52 at pages 4–13, Tr. at 449–450 (*see* Exhibit 53); and (8) the trial balance indicated that VWPC allocated more than it paid for at least one account, Tr. at 450–451 (*see* Exhibit 52 and Exhibit 53 at 7–8). Def.'s Br. at 18. *See also* Tr. at 451–452. *Compare* Exhibit 53 *with* Exhibit 61. Furthermore, the government points out that the fact that Mr. Fournier himself could not verify many figures, including a large figure for salaries and administration, because he did not have "enough details to reconstruct" the figures. Def.'s Br. at 14; Tr. at 321–326. That, and the fact that various "drafts" of deductive values (with differing unit prices, general expenses, and/or profits) were created, the government contends, emphasizes the need for background data without which, the government further argues, the allocations or elements of deductive values and computed values proposed by VWPA are *per se* unreliable. Def.'s Br. at 14.

1994).[36] The government contends this comports with a primary purpose of the valuation code: to eliminate the need for Customs to conduct detailed investigations outside the United States. Def.'s Br. at 16, citing *Generra, supra,* 905 F.2d at 380; *Moss Mfg., supra,* 896 F.2d at 539. Unless a test value has been accepted by Customs in advance, the government contends, the claims of related party, multi-tiered transactions become problematic, since most of the information relating to the first tier is outside the United States. According to the government, all of the information needed to verify a computed value claim, and "a great deal" of the information needed to verify a deductive value claim, is outside the United States. Since the plaintiff's deductive and computed valuations were not submitted for prior acceptance by Customs, the government therefore argues that "as a matter of law" they cannot be used to test the plaintiff's transaction value claim. Def.'s Br. at 15.

The plaintiff raises several points in argument and in response. First, it contends that the government's witness conceded the possibility that the deductive value statement may be accurate, and that the trial record shows the transfer prices reflected in the computed value statement cover all of VWPC's manufacturing costs, including general expenses, plus a percentage for profit. Second, it argues that the earlier audit report, Defendant's Exhibit C, has no bearing on the deductive values since it was limited to a review of the records of VWPC and production costs in Canada, and it has no bearing on the computed value statement because the audited production figures preceded the data relevant to this matter by two years. *See* Pl.'s Br. at 17–19 and 22; Pl.'s Ex 55, Ex. 58 at 2, Ex. 61 at 5; Tr. at 266–267, 289–290, 353–354, 427, 453, 487–489. *See also* 19 U.S.C. § 1401a(g)(3).

Third, it contends that an administrative policy requiring pre-approval of deductive and/or computed test values neither exists in the statute nor may be reasonably inferred therefrom, and that pre-approval of deductive and computed test values usurps this Court's jurisdiction to review Customs' appraisements and inhibits a party's right to trial *de novo*, an impermissible result. Pl.'s Rep. at 10–11, citing *American Grape Growers Alliance for Fair Trade, et al. v. United States, et al.*, 9 CIT 568, 622 F. Supp. 295 (1985) (rejecting an interpretation of 28 U.S.C. § 2645(c) which would render meaningless certain statutory grants of power to the court).

Fourth, it argues that it has presented evidence of deductive and computed test values which comport with the statutory scheme for substantiating related-party transaction values and which were prepared based on how the companies' records were actually kept in order to establish the principle of deductive and computed valuation. The plaintiff sub-

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[36] The government also contends that the interpretation is reasonable and entitled to deference under *Generra*, 905 F.2d at 379 (a point which appears to derive from *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984)). The government further argues the interpretation amounts to a long-standing and contemporaneous construction of the statute by the agency charged with its administration, which agency actually drafted the provision being interpreted, and as such is entitled to great deference in accordance with *United States v. Zenith Radio Corp.*, 562 F.2d 1209, 1219–1220, 64 CCPA 130, 142–143 (1977), *aff'd*, 437 U.S. 443, 450 (1978). Since the holding here is on other grounds, the Court need not delve into constitutional notions of deference.

mits that the Court need not perform the actual calculations for each entry and fabric style in the test case but may remand to Customs pursuant to 28 U.S.C. § 2643 with instructions for calculation thereof. On the deductive values specifically, it argues that although this test case covers a limited number of entries, the cases on the suspension disposition calendar cover entries of fabrics for every month of the fiscal year, and it was therefore reasonable to submit deductive test values covering the entire year. *See* Tr. at 352–353. Using only the sales transactions before the Court as the basis for determining the greatest aggregate quantity, the plaintiff argues that the transfer prices would still closely approximate its evidence of deductive value (as adjusted).[37] It argues that the government does not contest that the deductive values were prepared in accordance with the statute based upon audited financial statements and that all of the government's other points pertain only to the proposed computed test values. Pl.'s Rep. at 11, referencing Pl.'s Exs. 55–61; Tr. at 267–268. *See* 19 U.S.C. § 1401a(d)(2)(A)(ii).

Regarding the computed test values, the plaintiff contends that the government's primary criticism is that the government's auditor could not verify them at trial. The plaintiff asserts that computed value information on the VWPC-VWPA transactions was submitted to Customs' auditor who had ample opportunity to verify the data but chose not to do so because of time limitations. Tr. at 487, 489. The plaintiff contends that the proper place for verification is during such an audit, not during trial, and that the lack of verification reduces defendant's criticism of VWPC's cost data to mere speculation. Pl.'s Br. at 22 n.3. *See Government Auditing Standards* 7.55 (1994). Furthermore, VWPA contends, even if the higher overhead rates the government asserts should have been used were in fact used, the computed values would still show a "reasonable overall profit."

Deductive valuation constructs values for "merchandise concerned," which is defined as "the merchandise being appraised," "identical," or "similar" merchandise. 19 U.S.C. § 1401a(d)(1). "Merchandise concerned" must also be in accordance with one of three situations described in 19 U.S.C. § 1401a(d)(2)(A). Pertinent to this related-party action are where "merchandise concerned" is either (i) "sold in the condition as imported at or about the date of importation of the merchandise being appraised" or (ii) "sold in the condition as imported but not sold at or about the date of importation of the merchandise being appraised" but is sold within 90 days after the date of "such importation." 19 U.S.C. § 1401a(d)(2)(A)(i) and (ii).[38] *See* 19 U.S.C. §1401a(b)(2)(B). The plaintiff's deductive value statement does not comply with such re-

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[37] In other words, the entries in this test case all occurred within 90 days of each other, the earliest occurring on November 18, 1992 and the latest on February 2, 1993, and using the VWPA resale prices of such entries to establish the prices at which the greatest aggregate quantities of each of the imported fabrics were resold within 90 days, VWPA argues that the VWPC-VWPA import prices still "closely approximate" (and in all but one instance exceeded) the deductive test values, as adjusted. *See* Pl.'s Rep. at 12.

[38] "Such importation" refers to the date of importation of "merchandise being appraised," not the date of importation of "merchandise concerned." *See* S. Rep. 96–249, 96th Cong., 1st Sess. 122; H. Rep. 96–317, 96th Cong., 1st Sess 94–95.

quirement to the extent that its original deductive value methodology utilized importations which were not sold within 90 days of the date of importation of "merchandise being appraised,"[39] however it has submitted an alternate version utilizing a 90-day period, which results in some of the greatest aggregate quantity resale prices being slightly higher than those used in Plaintiff's Exhibit 55 while others are slightly lower or unchanged. *See* Pl.'s Conf. App. II to Pl.'s Br. The plaintiff argues that such "closely approximates," and thereby proves, the VWPC-VWPA import prices.

The government's objections to the plaintiff's deductive value statement were mainly directed at the utilization of total consolidated sales for determining *pro rata* allocation of some expenses but not others. Tr. at 310–314. *See* Pl.'s Ex. 51 at 2; Pl.'s Ex. 58; Pl.'s Ex. 60 at 29. The Court does not find such method objectionable *per se*, in light of the fact that the plaintiff's entire operation consisted of the importation and distribution of one line of merchandise. *Cf. See National Carloading Corp. v. United States*, 60 CCPA 54, 469 F.2d 1398 (1972); *Hill Brown Corp v. United States*, 54 CCPA 99 (1967); *United States v. Mitsui & Co., Ltd.*, 70 Cust. Ct. 301, 359 F. Supp. 1398 (1973). The Court accepts the plaintiff's representations that the allocations were straightforward and in accordance with generally accepted accounting principles and reasonably reflect the impact of time and material invested by VWPC in the operation of VWPA. *Cf. Coats & Clark, Inc. v. United States*, C.S.D. 4581, 74 Cust. Ct. 13, 16 (1975) ("When plaintiff has proved a profit which is normal by reasonable standards and which is, on its face, realistic, the burden must shift to defendant to disprove the legitimacy and correctness of this profit"). On the other hand, at trial at various points the government asked for the sources for figures to support selling and administrative expenses (Tr. at 296; Pl.'s Exs. 58, 60), proration of rent (Tr. at 301), and the amount of time to process Canadian versus U.S. orders (Tr. at 306–308). The Court agrees with the plaintiff that Customs's admitted failure to verify cost data during audit undermines rejecting the computed values (due to discrepancies which might have been resolved at the time through examination of source documentation) on the basis of the audit, however the plaintiff at trial still bears a burden of proof on its claims to assist the Court in making a determination consistent with *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (1984) ("the [C]ourt's duty is to find the correct result, by whatever procedure is best suited to the case at hand"). Notwithstanding the excellent reputation of Victor Woollen Products' accountants, their examination of the books and accounts, and their certification of the financial statements, the evidentiary record lacks the source documentation necessary for accurate factual determination, which the defendant had a right to examine. *Cf. Camel Manufacturing Company v. United States*, 215 Ct.Cl. 460, 572 F.2d 280 (1978); *Lykes Bros. Steamship Co. v. United States;* 198 Ct.Cl.

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[39] *See, e.g.*, HQ 546120 (Mar. 26, 1996).

312, 459 F.2d 1393 (1972); *Equipment, Inc. v. United States*, 1 Cl.Ct. 513 (1982). That circumstance implicates the actual expenses pro rated to the account of VWPA and used to construct deductive value, in the eyes of the government.

Moreover, notwithstanding the wording of the deductive and computed valuation provisions,[40] at the judicial level a claimant bears the burden of overcoming the presumption of correctness attaching to an administrative valuation decision. *See* 28 U.S.C. § 2639(a)(1). The government challenged the sources which would support the profit and general expenses deduction on Plaintiff's Exhibit 55 and the allocations claimed on Plaintiff's Exhibit 50, and the record shows that the government did not fully contest the veracity of the expenses allocated to VWPA nor did it challenge whether the profits and expenses were "typical" of other importers or producers, nevertheless this Court considers it incumbent upon a claimant not only to produce the sources which will substantiate the profit and expense amounts claimed but to assert that the amounts claimed were typical of imported or produced (as the case may be) merchandise "of the same class or kind." *Cf. New York Credit Men's Adjustment Bureau, Inc., supra*, 64 Cust. Ct. 770, 314 F. Supp. 1246; *Border Brokerage Company, supra*, R.D. 10759, 52 Cust. Ct. 567. The record is deficient in such respects, but there is a more fundamental reason why the methodology here is insufficient to the task of proving the acceptability of the claimed transaction values of the entered fabrics.

"The key to the resolution of valuation issues * * * is establishing an objective market-based price of the subject merchandise." *La Perla Fashions, Inc. v. United States*, 23 CIT ____, ____, 9 F. Supp.2d 698, 702 (1998), *aff'd* 185 F.3d 885 (1999). A central issue on remand is the acceptability for customs duty purposes of the transfer prices between VWPC and VWPA, and the statutory objectivity for related-party transaction valuation value is the requirement that the "merchandise concerned" in test deductive values or computed values consist of "identical" or "similar" merchandise.[41] 19 U.S.C. § 1401a(b)(2(B)(ii).

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[40] Deductive values of the "merchandise concerned" must be reduced by "an amount" equal to "any commission usually paid or agreed to be paid, or the addition usually made for profit and general expenses, in connection with sales in the United States of imported merchandise that is of the same class or kind, regardless of the country of exportation, as the merchandise concerned," and such "deduction made for profits and general expenses shall be based upon the importer's profits and general expenses, unless such profits and general expenses are inconsistent with those reflected in sales * * * of imported merchandise of the same class or kind * * *." 19 U.S.C. §§ 1401a(d)(3)(A)(i) and 1401a(d)(3)(B). The computed value statute is simpler:

> the amount for profits and general expenses * * * shall be based upon the producer's profits and general expenses, unless the producer's profits and general expenses are inconsistent with those usually reflected in sales of merchandise of the same class or kind as the imported merchandise that are made by producers in the country of exportation for export to the United States, in which case the amount * * * shall be based on the usual profits and expenses of such producers in such sales, as determined from sufficient information.

19 U.S.C. § 1401a(e)(2)(B). Since transaction valuation requires "sufficient information whether supplied by the buyer or otherwise available to the customs officer concerned," there is a question as to the claimant's burden of proof. *See* 19 U.S.C. § 1401a(b)(2)(C). Customs on its own has considered salaries and wages, rent, taxes, travel, advertising, automotive expense, and contract services (all of which were designated as "general expenses" on the claimant's income statement) as not atypical of merchandise of the same class or kind and allowed deduction of such expenses from unit prices. *See* HQ 545187 (Feb. 14, 1995, a/k/a "Valentines' Day") ("wedding gowns").

[41] Customs has determined that in order to analyze whether a particular test value closely approximates the transaction value of identical or similar merchandise, the test value must reflect a "previously accepted" customs valuation. *See* HQ 544455 (Mar. 14, 1995). *See also* HQ 545506 (Nov. 30, 1995); HQ 543568 (May 30, 1986). Since the result here is on other grounds, the Court need not consider whether this interpretation deprives a plaintiff of the right to *de novo* trial of such issue or whether the requisite objectivity might be satisfied through other means.

See 19 U.S.C. §§ 1401a(h)(2), (h)(4). The deductive value and computed value methodologies proffered by the plaintiff are in essence, however, restatements of the challenged transfer prices: "the greatest aggregate quantity" sales used to determine the deductive values and the costs asserted in the computed values pertain to entries which are themselves unliquidated and therefore unresolved, being the subject of this action or one suspended hereunder. Thus, the plaintiff's proffered deductive and computed values pertain not to "identical" or "similar" merchandise but rather to "the merchandise being appraised." Transaction valuation is not proven through such bootstrapping. *See Blue Bell, Inc. v. United States*, 213 Ct. Cl. 442, 449, 556 F.2d 1118, 1124 (1977).

CONCLUSION

The deductive or computed values were also proffered in the alternative, in the event that the transaction value of the imported fabrics was determined unacceptable. *See* 19 U.S.C. § 1401a(a). The record lacks objective reference from which to infer that VWPA's and/or VWPC's claimed profits and expenses are typical of importers and/or producers of fabrics of the same class or kind, and it also lacks the source documentation which would resolve apparent discrepancies and reconcile certain amounts claimed. However, *Jarvis Clark*, *supra*, instructs that the correct result must be obtained "by whatever procedure is best suited to the case at hand." 733 F.2d at 878. In light of the appellate decision, remand to Customs is necessary, and the Court therefore compels the parties to work together diligently to resolve Customs' alleged concerns regarding inconsistencies and source documentation. If the plaintiff produces sufficient information within a reasonable time, Customs shall: (1) make the necessary adjustments to transaction value required by section I, *supra*, (2) determine whether the transacted values of fabrics which can be compared in accordance with section II, *supra*, are "closely approximate," and (3) value the remaining fabrics on the basis of deductive or, at plaintiff's option, computed value. Otherwise, Customs shall value the entries in accordance with 19 U.S.C. § 1401a(f).

(Slip Op. 01–112)

SUNDERLAND OF SCOTLAND, INC., PLAINTIFF *v.*
UNITED STATES, DEFENDANT

Court No. 97–04–00680

[On cross motions for summary judgment on whether there was mistake of fact or other inadvertency in classification of pullovers/jackets/anoraks, judgment for defendant.]

(Decided August 29, 2001)

Elon A. Pollack, P.C., Los Angeles, California *(Elon A. Pollack* and *Eugene P. Sands)*, for the plaintiff.

Stuart E. Schiffer, Acting Assistant Attorney General; *Joseph I. Liebman*, Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice, *(Amy M. Rubin); Yelena Slepak*, Attorney, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs Service, of counsel, for the defendant.

OPINION

MUSGRAVE, *Judge:* Before the Court are Rule 56 cross-motions for summary judgment on whether there is a cognizable mistake of fact, clerical error, or inadvertence in entry of "pullover" garments for which reliquidation under 19 U.S.C. § 1520(c)(1) is appropriate. The plaintiff invoked jurisdiction under 28 U.S.C. § 1581(a) to commence this action, however that properly depends on whether its claim is colorable. *See NEC Electronics U.S.A., Inc. v. United States*, 13 CIT 214, 709 F. Supp. 1171 (1989); *Computime, Inc. v. United States*, 9 CIT 553, 622 F. Supp. 1083 (1985). Accordingly, the Court considers the defendant's motion one of dismissal pursuant to Rule 12(b).

The parties aver the following. In 1992, the plaintiff obtained a binding ruling letter from the U.S. Customs Service ("Customs") on the proper classification of styles of pullovers, No. 1111, No. 1114,[1] and No. 1117 (the "Styles"). Customs determined that the Styles met AATCC Test Method 35–1985 for "water resistance"[2] and that the proper classification was under HTSUS 6201.93.3000, providing for other men's anoraks, windbreakers and similar articles with a duty rate of 7.6% *ad valorem*. *See* NYRL 876026 (Sep. 4, 1992). The plaintiff commenced importation of the Styles accordingly. *See* Pl.'s Separate Statement of Undisputed Material Facts ("Pl.'s Statement") ¶¶ 1 & 2.

Subsequently, it was determined that samples of Styles taken from a shipment in July 1993 into the Port of Los Angeles ("LAP") did not meet the AATCC 35–1985 test for water resistance and the Styles were reclassified. *See id.* ¶ 3; Pl.'s Memorandum of Points and Authorities in Support of Motion for Summary Judgment ("Pl.'s Mem.") at 2. The plaintiff avers that on or about January 24, 1994, a Customs Import Specialist

[1] The defendant requests that the Court limit any decision here to style Nos. 1111 and 1117, since style No. 1114 does not appear on any of the commercial invoices subject to this action. Defendant's Memorandum in Support of Its Cross-Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment ("Def's Mem") n.1.

[2] As defined in the Harmonized Tariff Schedule of the United States ("HTSUS") at Chapter 62, Additional Note 2.

("CIS") telephoned the plaintiff's customs broker, Mr. Jordan, and directed him to continue to classify future shipments of Styles as not water resistant until such time as NYRL 876026 is revoked.[3] Pl's Statement ¶ 5; Pl.'s Mem. at 4. The plaintiff further avers that Styles subject to this action and covered by entry no. 286–0549984–8 (May 16, 1994) and entry no. 231–4914947–0 (June 5, 1994) were so classified. Pl.'s Statement ¶ 6. Attached to the Jordan Declaration are copies of documents purporting to be business records which indicate anticipation, either on the part of Mr. Jordan or Customs or both, that such would occur in future. *See* Pl.'s Mem., Exs. A & B.

LAP requested Customs Headquarters to revoke NYRL 876026 on the ground that LAP's testing was now controlling. *Cf.* Pl.'s Mem., Ex. E. No samples were sent for further testing to Headquarters. *Id.* On or about April 25, 1994, Headquarters responded to the District Director of LAP that

> the garments submitted with Sunderland of Scottland, Inc.'s request for a binding classification ruling were determined to be water resistant by the New York Customs laboratory. There is no reason to hold these laboratory results suspect, nor has this office been provided with any information which would serve as grounds for a reversal of the holding in NYRL 876026. * * *
>
> Assuming that the testing methods employed by both the New York and Los Angeles Customs laboratories are correct, this office does not see the need to revoke NYRL 876026 nor to reject the findings of the Los Angeles Customs lab merely because they are at variance with the initial findings of the New York Customs lab with regard to the same garment styles. Indeed, given the variability of plastics applications, the fact that different shipments of the same styles of garments resulted in different degrees of water resistancy when tested in accordance with the AATCC 35–1985 is not surprising. We recognize that future shipments of the above-referenced styles may very well pass the water resistant test, in which case application of NYRL 876026 would be warranted.
>
> In situations where a Customs laboratory test has been performed on merchandise purporting to be "identical" to merchandise the subject of a prior ruling, where the lab test reveals that the merchandise the subject of the subsequent transaction is not the same, the classification of these goods will be based on the lab's findings and the original ruling will not control. To hold otherwise would increase the likelihood of importers' relying on previously issued rulings which are no longer representative of the merchandise currently being imported. The opportunity for abuse in this situation is considerable.

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[3] The defendant denies, and avers upon information and belief that the CIS told Mr. Jordan that as a result of HQ 955909, effective June 7, 1994, LAP would require the plaintiff to classify all non-water resistant items of the Styles as non-water resistant, and it also avers that any dispute with respect to the plaintiff's averments is not material for purposes of considering the government's cross-motion. Defendant's Response to Plaintiff's Statement of Material Facts as to Which There Are No Genuine Issues To Be Tried ("Def's Resp.") ¶¶ 6, 9.

HOLDING:

NYRL is affirmed.

If style numbers 1114, 1111 and 1117 are determined to be water resistant when tested by a Customs laboratory in accordance with AATCC Test Method 35–1985, classification is proper under subheading 6201.93.3000 HTSUS[ ] * * *.

If laboratory tests reveal that the subject garments are not water resistant, the merchandise is different from that classified in NYRL 876026 and that ruling will not control, as mandated by * * * 19 CFR 177.9(b)(2)[ ]. In instances where styles 1114, 1111 and 1117 are not deemed water resistant when tested in accordance with AATCC Test Method 35–1985, classification is proper under subheading 6201.93.3511, HTSUS[ ], which provides for other men's anoraks, windbreakers and similar articles, dutiable at a rate of 29.5 percent *ad valorem*. * * *

HQ 955909 (Apr. 25, 1994). *See id.*

According to the Jordan Declaration, on or about June 8, 1994, the CIS provided Mr. Jordan with a copy of HQ 955909 and informed him that effective June 7, 1994, Customs would require the plaintiff to classify the Styles under HTSUS 6201.93.3511 as not water resistant unless the plaintiff proved the pullovers met AATCC Test Method 35–1985. Jordan Decl., ¶ 6. Mr. Jordan declares that he made a mistake in relying upon the CIS's instruction, that he was under the mistaken belief that her directive accurately reflected HQ 955909, and that had he read HQ 955909 he would have disregarded such advice. Jordan Decl., ¶ 9.

Mr. Jordan forwarded the information from the CIS to the plaintiff. Jordan Decl., ¶ 7; Freund Decl. ¶¶ 3 & 4; Ex. B. In or about May or June 1994, the plaintiff changed brokers from Yusen Air & Sea Service to Expeditors International. Pl.'s Statement ¶ 13. The plaintiff forwarded the information received from Mr. Jordan to Expeditors, which entered Styles of pullovers from May 21, 1994 as not water resistant. *Id.* ¶¶ 13 & 14. The plaintiff avers that such entries were in accordance with the directive of the CIS.[4] Pl.'s Mem. at 6. It further avers that Customs admits that it did not test any of the garments comprised by the entries which are the basis of this case. *Id.* ¶ 16. *See* Pl.'s Mem., Ex. G (Defendant's Response to Plaintiff's Request for Admissions ¶¶ 1 & 2).

The plaintiff argues that the entries of Styles should have been classified in accordance with HQ 955909 as not water resistant and that it was erroneous for Customs to classify and liquidate the Styles under subheading 6201.93.3511 or 6202.93.5011 as not water resistant. Pl.'s Mem at 6. The plaintiff states that in or about February 1995, it "realized" that HQ 955909 affirmed NYRL 876026, and on March 16, 1995 began filing protests for entries of Pullovers classified as non-water resistant which were liquidated within the preceding 90 days. *Id.* at 7. Customs approved four of these protests. Def's Resp. ¶ 18. As to entries of Styles which were liquidated more than 90 days prior, the defendant avers that

[4] The defendant avers that pullovers of Style No. 1111 were classified as not water resistant on Invoice 15 of Entry No. 231–4914947–0 (June 5, 1994) under subheading 6201.93.35 of HTSUS. Def's Resp. ¶ 6.

Customs approved the first three of the plaintiff's requests for reliquidation under 19 U.S.C. § 1520(c)(1). *Id.* ¶ 6, Ex. F. The protests filed on the claims for reliquidation, which were denied by Customs and are the subject of this action, were suspended by LAP pending a decision on the plaintiff's Application for Further Review of Protest No. 2720–95–101411, which LAP forwarded to the Office of Regulations and Rulings ("ORR"). *See* Def's Statement of Additional Material Facts as to Which There Are No Genuine Issues To Be Tried ("Def's Statement") ¶¶ 5–7. On Protest 2720–95–101411, ORR stated that since

> the protestant had received two rulings indicating two different laboratory results (and therefore, two different classifications), it was incumbent on the protestant to prove which classification was appropriate for the entry in question. In fact, the protestant still has not, in accordance with 19 CFR 177.9(b)(2), provided any evidence that the jackets involved were identical to the samples submitted in the ruling request. Customs alleged "lack of knowledge of coatings on this import shipment" was a result of the protestant's failure to provide such information. The classification of the garments by the import specialist, if in error, was an error in the construction of law, and excluded from relief under 19 U.S.C. 1520(c)(1).

HQ 226707 (Sep. 19, 1996). Following denial of that protest, LAP denied the remaining suspended protests subject to this action. Def's Statement ¶¶ 8–9. The Court concludes that there are no genuine issues of material fact and that summary judgment on the matter is appropriate. *See, e.g., Executone Information Systems v. United States*, 96 F.3d 1383, 1385 (Fed. Cir. 1996); *Sweats Fashion, Inc. v. Pannill Knitting Co.* 833 F.2d 1560, 1562–1563 (Fed. Cir. 1987).

19 U.S.C. § 1520(c)(1) does not remedy mistakes of law, thus the preliminary inquiry is whether the plaintiff pleads a mistake of fact or of law. A mistake of fact occurs when a decision is based on a reasonable belief that a fact exists differently than in reality, and a mistake of law occurs when the legal consequences of a given set of facts are incorrectly interpreted or anticipated. *C.J. Tower & Sons of Buffalo, Inc. v. United States*, C.D. 4327, 68 Cust. Ct. 17, 22, 336 F. Supp. 1395, 1399 (1972), *aff'd*, 61 CCPA 90, 499 F.2d 1277 (1974). *See Hambro Automotive Corp. v. United States*, 66 CCPA 113, 119, 603 F.2d 850, 855 (1979). Central to the plaintiff's claim is alleged reliance upon direction from the CIS to its customs broker to enter all Styles as not water resistant. If so, that was in error. Unfortunately, the Court must conclude that it was an error in the construction of law for which the protest procedures of 19 U.S.C. § 1514 were designed, and it was not the type of inadvertence which must characterize 19 U.S.C. § 1520(c)(1) claims. *Compare, e.g., Chrysler Corp. v. United States*, 24 CIT ___, 87 F. Supp. 2d 1339 (2000) and *Zaki Corp. v. United States*, 21 CIT 263, 960 F. Supp. 350 (1997) with *Universal Cooperatives, Inc. v. United States*, 13 CIT 516, 715 F. Supp. 1113 (1989) *and Fibrous Glass Products, Inc. v. United States*, C.D. 3874, 63 Cust. Ct. 62 (1969). In the absence of a valid protest via 19 U.S.C. § 1514,

jurisdiction under 28 U.S.C.§ 1581(a) will not lie. *NEC Electronics*, *supra*, 13 CIT at 218, 709 F. Supp. at 1176. Fundamentally, the plaintiff argues that it should not bear the onus for relying on the advice of so-called "experts" with respect to the proper classification of its merchandise. Pl.'s Mem at 15. Briefing, however, offers inadequate explanation of why it took until February 1995 for the plaintiff to "realize" the alleged error of Customs' interpretation of HQ 955909 after being notified of Customs' position, via its customs broker, in June 1994. The Court therefore declines to exercise subject matter jurisdiction under 28 U.S.C. § 1581(i).

Judgment will enter accordingly.

(Slip Op. 01–113)

AK STEEL CORP., ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND POHANG IRON AND STEEL CO., LTD., POHANG COATED STEEL CO., LTD., AND POHANG STEEL INDUSTRIES CO., LTD., DEFENDANT-INTERVENORS, AND UNION STEEL MANUFACTURING CO., LTD., DEFENDANT-INTERVENOR, AND DONGBU STEEL CO., LTD., DEFENDANT-INTERVENOR

Consolidated Court No. 97–05–00865

(Dated August 30, 2001)

JUDGMENT

RESTANI, *Judge:* Having received no objections to the final remand results ordered in *AK Steel Corporation, et al. v. United States*, 226 F.3d 1361 (Fed. Cir. 2000) and *remand order*, Consol. Court No. 97–05–00865 (C.I.T. June 21, 2001), the court hereby sustains the final remand redetermination of the Department of Commerce herein.

(Slip Op. 01–114)

GOVERNMENT OF UZBEKISTAN AND NAVOI MINING & METALLURGICAL COMBINAT, PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 00–08–00392

[ITA sunset review determination remanded.]

(Dated August 30, 2001)

White & Case (Carolyn B. Lamm and *Adams C. Lee)* for plaintiff.

Stuart E. Schiffer, Acting Assistant Attorney General, *David M. Cohen*, Director, *Velta A. Melnbrencis*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, *David R. Mason*, Attorney, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

OPINION

RESTANI, *Judge:* This matter is before the court on a motion for judgment on the agency record pursuant to USCIT Rule 56.2. Plaintiffs, the Government of Uzbekistan and Navoi Mining & Metallurgical Combinat (collectively "Uzbeks"), challenge the determination of the United States Department of Commerce ("Commerce" or "ITA") pursuant to 19 U.S.C. § 1675(c) (1994)[1] ("sunset review") that dumping of uranium from Uzbekistan is likely to occur if the antidumping duty discipline is removed.[2]

FACTS

On December 5, 1991, Commerce initiated an antidumping duty investigation to determine whether imports of uranium from the Union of Soviet Socialist Republic ("USSR") were being or were likely to be sold in the United States at less-than-fair value ("LTFV"). *Uranium from the Union of Soviet Socialist Republics*, 56 Fed. Reg. 63711 (Dept' Comm. 1991). On December 23, 1991, the U.S. International Trade Commission ("ITC" or "Commission") issued an affirmative preliminary injury determination.

On December 28, 1991, the USSR dissolved and the United States subsequently recognized the 12 newly independent States which

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[1] 19 U.S.C. § 1675(c)(1) reads, in relevant part, as follows:

> Notwithstanding subsection (b) of this section and except in the case of a transition order defined in paragraph (6), 5 years after the date of publication of—
>
> (A) a countervailing duty order (other than a countervailing duty order to which subparagraph (B) applies or which was issued without an affirmative determination of injury by the Commission under section 1303 of this title), an antidumping duty order, or a notice of suspension of an investigation, described in subsection (a)(1),
>
> * * * * * * *
>
> the administering authority and the Commission shall conduct a review to determine, in accordance with [section 1675a] of this title, whether revocation of the countervailing or antidumping duty order or termination of the investigation suspended under [section 1671c or 1673c] of this title would be likely to lead to continuation or recurrence of dumping or a countervailable subsidy (as the case may be) and of material injury.

[2] The court has sustained the determination of the International Trade Commission ("ITC") that imports of uranium from Uzbekistan are not likely to injure the United States industry if the antidumping duty discipline is removed. *See Ad Hoc Comm. of Domestic Uranium Producers v. United States*, No. 00–09–00450, slip op. 01–103 (Ct. Int'l Trade Aug. 14, 2001). A decision by either ITC or Commerce to terminate the proceedings pursuant to a sunset review will end the proceedings. 19 U.S.C. § 1675(d). At this time a change upon appeal of that decision is still possible. If the decision to sustain the ITC determination becomes conclusively final, this dispute will be moot.

emerged. Commerce, nevertheless, determined to continue the investigation. That determination was sustained. *See Techsnabexport, Ltd. v. United States*, 16 CIT 420, 795 F. Supp. 428 (1992) (*"Techsnabexport I"*), and *Techsnabexport, Ltd. v. United States*, 16 CIT 855, 802 F. Supp. 469 (1992) (*"Techsnabexport II"*).

Commerce determined that sales of uranium from six of the 12 former republics, including Uzbekistan, were made at LTFV during the period of investigation, which covered June 1, 1991 through November 30, 1991. *Uranium From Kazakhstan, Kyrgystan, Russia, Tajikistan, Ukraine and Uzbekistan; Uranium from Armenia, Azerbaijan, Byelarus, Georgia, Moldova and Turkmenistan*, 57 Fed. Reg. 23,380, 23,380, 23,382 (Dep't Comm. 1992) (*"Preliminary Determination"*). Because it found that the respondents failed to provide adequate information in a timely manner, Commerce based its preliminary LTFV calculations upon the best information otherwise available ("BIA"), which was largely petition data and which resulted in a cash deposit rate equal to 115.82 percent for all relevant entries of uranium. *Id.* at 23,382, 23,384.

The investigation of uranium from the countries found to be selling at LTFV was suspended in October of 1992 because those countries entered into agreements to restrict the volume of direct or indirect exports to the United States.[3] There is no allegation that any interested party sought the continuance of the investigation after notice of suspension as provided in 19 U.S.C. § 1673c(g), or sought an administrative review of the suspension or of the dumping margin as provided in 19 U.S.C. § 1675(a), or a changed circumstances review as provided in 19 U.S.C. § 1675(b).

On August 2, 1999, Commerce initiated a sunset review of the suspension agreement on uranium from Uzbekistan. *Initiation of Five-Year ("Sunset") Reviews*, 64 Fed. Reg. 41,915, 41,915 (Dep't Comm. 1999). In their response to the initiation of the review, plaintiffs contended, among other things, that procedural defects in the original investigations prevented their full participation and denied that subject imports from Uzbekistan were ever dumped in the United States; that the sunset determination must be based upon country-specific information for Uzbekistan; and that Commerce must terminate the suspended investigation because there was no substantial evidence to support a positive likelihood determination with respect to Uzbekistan. In plaintiffs' view, there also has been no dumping since entry into the suspension agreement because sales have been made pursuant to long-term contracts in which the prices of sales to the United States are set above comparable U.S. market prices; and Uzbekistan has no economic incentive to sell at below U.S. market prices. Plaintiffs also contended that Commerce should find good cause under 19 U.S.C. § 1675a(c) to consider factors other than the existing margin and the volume of merchandise before

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[3] *See Uranium from Kazakhstan, Kyrgyzstan, Russia, Tajikistan, Ukraine, and Uzbekistan*, 57 Fed Reg. 49,220, 49,255–61 (Dep't Comm. 1992) [hereinafter *"Uzbek Suspension Agreement"*]. Subsequent amendments to the agreements are not relevant here.

and after the suspension agreement, and that the Department should allow them to submit country-specific data.[4]

On February 18, 2000, Commerce issued *Uranium from Uzbekistan*, 65 Fed. Reg. 10,471 (Dep't Comm. 2000) (prelim. sunset determ.) [hereinafter *"Preliminary Results"*]. The *Preliminary Results* adopted and incorporated an *Issues and Decision Memorandum for the Sunset Review of Uranium from Uzbekistan* (Feb. 28, 2000), P.R. Doc. 1248, Pl.'s App., Tab 4. In response, plaintiffs submitted a case and rebuttal brief that again complained about the procedural irregularities in the original investigation and asserted that Commerce erred in the *Preliminary Results*. *Uzbeks Case Brief* (Apr. 10, 2000), C.R. Doc. 1270, Pl.'s App., Tab 10; *Uzbeks Rebuttal Brief* (Apr. 18, 2000), P.R. Doc. 1281, Pl.'s App., Tab 11.

On July 5, 2000, Commerce rejected plaintiffs' arguments in *Uranium from Uzbekistan*, 65 Fed. Reg. 41,441 (Dep't Comm. 2000) (final sunset determ.) [hereinafter *"Final Results"*]. The *Final Results* adopted and incorporated an *Issues and Decision Memorandum for the Sunset Review of Uranium from Uzbekistan* (June 27, 2000), P.R. Doc. 1288, Pl.'s App., Tab 2.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c). In reviewing final determinations in antidumping duty investigations and reviews, the court will hold unlawful those agency determinations that are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

This case is *sui generis*. It involves the issue of what procedures are to be followed when an antidumping case is filed against one country and that country dissolves into numerous others before the proceedings are concluded.

In earlier litigation, the court permitted the investigation of uranium imports from the former Soviet republics to continue even though the proceedings were commenced against the Soviet Union and certain deficiencies in responses were attributable to the break up of the Soviet

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[4] 19 U.S.C. § 1675a(c) reads in relevant part as follows:

(1) In general

In a review conducted under [section 1675(c)] of this title, the administering authority shall determine whether revocation of an antidumping duty order or termination of a suspended investigation under [section 1673c] of this title would be likely to lead to continuation or recurrence of sales of the subject merchandise at less than fair value. The administering authority shall consider—

(A) the weighted average dumping margins determined in the investigation and subsequent reviews, and

(B) the volume of imports of the subject merchandise for the period before and the period after the issuance of the antidumping duty order or acceptance of the suspension agreement.

(2) Consideration of other factors

If good cause is shown, the administering authority shall consider such other price, cost, market, or economic factors as it deems relevant.

(3) Magnitude of the margin of dumping

The administering authority shall provide to the Commission the magnitude of the margin of dumping that is likely to prevail if the order is revoked or the suspended investigation is terminated. The administering authority shall normally choose a margin that was determined under [section 1673d] of this title or under [section 1675(a) or (b)(1)] of this title.

19 U.S.C. §§ 1673d, 1675(a), and 1675(b)(1) are, respectively, final determinations, periodic review determinations and changed circumstances review determinations.

Union. It was the court's understanding that the individual exporting countries or concerns would be permitted to submit their own data before adverse consequences ensued or would receive appropriate consideration or adjustment due to lack of control from the outset of the proceedings. *Techsnabexport II*, 802 F. Supp. at 473. Commerce has done little to adapt its procedures to fit these unique circumstances and does not attempt to defend its actions on the basis that the preliminary margin is actually reflective of dumping at any time by the Uzbeks. Rather, defendant attempts to support its decision by claiming that the Uzbeks are technically barred from raising their arguments.

Commerce argues that 19 U.S.C. § 1675(c)(3) permits it to assume that there was dumping even though the proceedings were suspended, and to adopt the preliminary BIA margin for purposes of its analysis and in order to provide a margin to the ITC. Commerce seeks to support its conclusion by noting that the agency could not rely on the margins specified in § 1675a(c)(3), because there is neither a final determination margin to use nor any margin available from a review of such a determination.

It may be that in a more normal case with no § 1675a(c)(3) margins available, Commerce has the discretion to assume dumping and to use any preliminary margin that is more than *de minimis*. *See Policies Regarding the Conduct of Five-year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders*, 63 Fed. Reg. 18,871, 18,873 (Dep't Comm. 1998) (Sunset Policy Bulletin). The court need not decide whether Commerce may use a preliminary margin without applying some safeguards or doing further investigation for purposes of an ordinary sunset review. This is not a normal case. Commerce's use in this case of the preliminary margin is not based on substantial evidence or in accordance with law. Commerce here abused its discretion when it used such discretion to deny parties fair opportunity to participate in a meaningful way.[5]

It is spurious to argue that the Uzbeks had the chance to obtain an effective review under 19 U.S.C. §§ 1675(a) or (b) of the highly adverse margin and to dispute any procedural deficiencies in such reviews. In this case there was no antidumping duty order to review under §§ 1675(a) and (b) because the suspension agreement interrupted the proceedings, as it was designed to do. A section 1675 review of the suspension agreement in order to obtain a new margin calculation itself would be meaningless. Rules governing compliance with and modification of the suspension agreement are provided for within the agreement itself. *See* Uzbek Suspension Agreement, Arts. VIII, X, XI, and there is

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[5] Commerce does not address the Uzbeks' allegation that they did not receive notice of the original proceedings until after the preliminary margin was determined. It is undisputed that the Uzbeks attempted to submit their own data here and were rebuffed. Commerce simply refused to consider the possibility that a re-calculation of the dumping margin would be particularly appropriate in this case, notwithstanding the fact that the Statement of Administrative Action ("SAA") contemplates that in a sunset review new margins may be calculated if extraordinary circumstances exist. SAA, accompanying H.R. Rep. No. 103-826(I), at 890-91, *reprinted in* 1994 U.S.C.C.A.N. 4040, 4214.

little purpose to focusing on the past margin arrived at in the extraordinary circumstances present in this case.[6]

Under these circumstances there is more than enough reason for Commerce to consider factors outside the norm, as it acknowledged it may do under 19 U.S.C. § 1675a(c)(2), and there is insubstantial reason for proceeding in lockstep with "normal" procedures. The Uzbeks have not had a fair opportunity to have any information considered as to whether their exports were dumped and at what level such dumping occurred, if it did occur. Section 1675(c) assumes that dumping occurred. That assumption has not been shown to be an acceptable one in this case, particularly at the level selected.[7]

Further, Commerce does not address the Uzbeks' argument that its conduct violates the WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (1994) ("Antidumping Agreement").[8] Rather, it relies on another erroneous technical bar argument. It relies on the prohibition of 19 U.S.C. § 3512(c)(1) against challenges to governmental action on the basis that it violates a WTO agreement. Of course, the Uzbeks are not bringing an action under any WTO agreement, and they are free to argue that Congress would never have intended to violate an agreement it generally intended to implement, without expressly saying so.

The court need not resolve whether Commerce's action violates the Antidumping Agreement and whether Congress intended to permit such violation. Nor will the court address whether the overall decision that dumping would continue if the antidumping duty regime were not applicable is supported by substantial evidence. As a threshold matter Commerce must support its finding of a non-*de minimis* margin before it can embark on a rational § 1675(c) analysis. Under the unique facts of this case, it cannot simply accept the preliminary BIA margin based on the "normal" rules. It must use the discretion given to it by the statute to address an extraordinary situation so as to make some rational decisions in a fair manner.

This matter is remanded for conduct in accordance with this opinion. As Commerce lacks information to provide a reasonably accurate likely margin for Uzbekistan, it shall gather new data. Because of the matter discussed in note 2, the parties shall consult and, within 11 days hereof, propose an order governing timing of the remand proceedings.

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[6] Although they arise differently, changed circumstances reviews and sunset reviews share the purpose of determining whether continued unfair trade relief is necessary. *See Eveready Battery Co., Inc. v. United States*, Slip Op. 99–126 at 20 (CIT 1999). In *Eveready*, the ITC took the position that an ongoing sunset review moots a request for a changed circumstance review, which the court found to be true under the facts of that case.

[7] Indeed, the preliminary margin is based on petition data as to the USSR and not as to Uzbekistan.

[8] The Uzbeks assert that Articles 6.0 and 11.4 of the Antidumping Agreement together require in a sunset review that dumping margins be calculated for individual exporters or producers.

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